924.

SUPREME COURT OF THE UNITED STATES.

No. 161.

SYLVESTER B. PRESTON, WM. KENDALL, WM. NICHOLS, AND WM. T. PHILLIPS, PLAINTIFFS IN ERROR,

vs.

CHARLES BRACKEN.

IN ERROR TO THE SUPREME COURT OF WISCONSIN.

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J. & G. S. Gideon, printers.

Pleas before the supreme court of Wisconsin Territory, at a term thereof begun and held at the Capitol, in Madison, the seat of government of said territory, on the third Monday of July, A. D. one thousand eight hundred and forty-seven. Present, the honorable Charles Dunn, chief justice, and the honorable David Irvin and the honorable Andrew G. Miller, associate judges of said court.

Be it remembered, that heretofore, to wit, on the 22d day of April, A. D. 1847, Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, by their attorneys, Messrs. Dunn, Jones, and Crawford, filed in the office of the clerk of the supreme court of the Territory of Wisconsin their precipe for a writ of error; which said precipe is in the words and figures following, to wit:

SYLVESTER B. PRESTON, William Kendall, William Nichols, and William T. Phillips, ads. CHARLES BRACKEN. } In ejectment

District court, Milwaukie county, Wisconsin Territory.

The clerk of the supreme court of Wisconsin Territory will please issue a writ of error, directed to the judge of the district court of Milwaukie county aforesaid, to remove into said supreme court the record of a certain cause heretofore depending and tried in said district court at the June term, A. D. 1846, thereof, in ejectment, wherein Charles Bracken was plaintiff, and Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, were defendants; and upon the filing of a supersedeas bond, the said clerk will also please issue a writ of supersedeas in said cause.

DUNN, JONES, & CRAWFORD,
Attys. for plaintiffs in error.

Upon the filing of which precipe a writ of error issued out of the office of the clerk of said supreme court; which said writ is in the words and figures following, to wit:

TERRITORY OF WISCONSIN, *Supreme court, ss:*

The United States of America, to the judge of the district court of the county of Milwaukie, in said territory, greeting:

Because in the record and proceedings, and also in the rendition of judgment, in a suit which was duly tried in the district court of Milwau.

kie county aforesaid, before you, between Charles Bracken, plaintiff, and Sylvester B. Preston, William Kendall, William Nichols, and Wm. T. Phillips, defendants, in a plea of ejectment, manifest error hath intervened to the great damage of the said Sylvester B. Preston et als., defendants as aforesaid, as by their complaint we are informed; and we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then you send to the judges of our supreme court of the Territory of Wisconsin, distinctly and openly, under your seal, with all convenient despatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same, and this writ; so that they may have the same at the next term of our said supreme court, to be held at Madison, in the territory aforesaid, on the third Monday of July, A. D. 1847; that the record and proceedings aforesaid being inspected, we may cause to be further done for correcting that error, what of right, and according to law and the rules of our said court, ought to be done.

Witness the Hon. Charles Dunn, chief justice of the supreme court of Wisconsin Territory, at Madison, this 22d day of April, A. D. 1847.

[L. S.]

Attest: LA FAYETTE KELLOGG, *Clerk*.

And afterwards, to wit, on the 22d day of April aforesaid, the said Sylvester B. Preston et als., by their attorneys aforesaid, filed in the clerk's office aforesaid their bond for a supersedeas on the judgment rendered in the district court aforesaid; which said bond is in the words and figures following, to wit:

Know all men by these presents, that we, Sylvester B. Preston, of Dubuque, in the State of Iowa, and William Kendall, William Nichols, William T. Phillips, of the county of Iowa, Wisconsin Territory, as principals, and John Milton, of the same place, as surety, are held and firmly bound, unto Charles Bracken, of the county of Iowa, and Territory of Wisconsin, in the penal sum of five hundred dollars, lawful money of the United States of America; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this twelfth day of April, A. D. 1847.

The condition of this obligation is such, that whereas, in a certain action of ejectment tried in the United States district court for the county of Milwaukie, Wisconsin Territory, at the June term, A. D. 1846, of said court, in which said action the said Charles Bracken was plaintiff, and the above bounden Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips were defendants, the said defendants have sued out a writ of error to remove said cause into the supreme court of Wisconsin Territory. Now, if the said defendants shall prosecute their suit to effect in the said supreme court, and pay and satisfy such

judgment as shall be rendered thereon, then this obligation to be void, otherwise of full force and virtue.

S. B. PRESTON, [L. S.]
WM. KENDALL, [L. S.]
his
WILLIAM ⋈ NICHOLS, [L. S.]
mark.
WILLIAM T. PHILLIPS, [L. S.]
JOHN MILTON. [L. S.]

Signed, sealed, and delivered in the presence of—
Sam. Crawford,
C. Abbott,
C. P. De Lamotte.

SUPREME COURT, *ss:*

I hereby approve of the surety to the within bond, April 22, 1847.
L. F. KELLOGG, *Clerk, S. C. W. T.*

Upon the filing of which said bond a certificate of supersedeas, issued out of the clerk's office aforesaid, in due form of law, duly attested and under the seal of said court.

And afterwards, to wit, on the seventeenth day of June, A. D. 1847, the said Sylvester B. Preston et al., plaintiffs in error, by their attorneys aforesaid, returned into the clerk's office aforesaid, the return or transcript of the said district court of Milwaukie county in answer to the writ of error above recited, which said return or transcript is in the words and figures following, to wit:

Pleas before the Hon. Andrew G. Miller, judge of third judicial district court of the Territory of Wisconsin, at a term of said court, begun and held at the court-house, in the city and county of Milwaukie, in the territory aforesaid, on the second Monday of June, in the year of our Lord one thousand eight hundred and forty-six.

CHARLES BRACKEN,
vs.
SYLVESTER B. PRESTON, William Kendall, William Nichols, and William T. Phillips. } Ejectment.

Be it remembered, that [at] a term of the district court for the county of Iowa, in said Territory, begun and held at the court-house, in the town of Mineral Point in said county, on the second Monday of April, A. D. 1845, to wit, on the 15th day of April, came into court Charles Bracken, by his attorney, Moses M. Strong, esq., and filed his declaration in ejectment, and notice thereto annexed, in the words and figures following, to wit:

District court, Iowa county, Wisconsin territory, April term, 1846.

CHARLES BRACKEN,
vs.
SYLVESTER B. PRESTON, William Kendall, William Nichols, and William T. Phillips.

IOWA, *to wit:*

Charles Bracken, by Moses M. Strong, his attorney, complains of Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, being in custody, &c., for that whereas the said Charles Bracken, on the first day of March, in the year of our Lord one thousand eight hundred and forty-two, was possessed of a certain lot of land, with the appurtenances, situate in the county of Iowa, Wisconsin territory, and being known and designated as the east half of the southeast quarter of section number five, in township four north, of range three east, of the fourth principal meridian, in the district of lands subject to sale at Mineral Point, Wisconsin territory, containing eighty acres and twenty-three hundredths of an acre, according to the official plats of the survey of said lands, returned to the General Land Office by the surveyor general, of which said premises the said Charles Bracken claims the one equal undivided third part in fee simple; and he, the said Charles Bracken, being so possessed thereof, the said Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, afterwards, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and forty-two, entered into the said premises and ejected the said Charles Bracken therefrom, and do unjustly withhold from the said Charles Bracken the possession thereof, to the damage of the said Charles Bracken of ten thousand dollars; and therefore he sues, &c. And also, for that, whereas the said Charles Bracken on the first day of June, in the year of our Lord one thousand eight hundred and forty-four, was possessed of a certain lot or tract of land, with the appurtenances, situated in the county of Iowa, and territory of Wisconsin, and known and designated as the east half of the northeast quarter of section number five, of town. four, of range three east, of the fourth principal meridian, in the district of land subject to sale at the Mineral Point, Wisconsin Territory, containing eighty acres and twenty-three hundredths of an acre, according to the official plats of the survey of said land returned to the General Land Office by the surveyor general, of which said premises the said Charles Bracken claims the equal undivided third part in fee simple; and the said Charles Bracken being so thereof possessed, the said Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, afterwards, to wit, on the tenth day of June, in the year of our Lord one thousand eight hundred and forty-four, entered into the said premises and ejected the said Charles Bracken therefrom, and do unjustly withhold from the said Charles Bracken the possession thereof, to the damage of the said Charles Bracken of ten thousand dollars; and therefore he brings his suit, &c.

By MOSES M. STRONG,
His Attorney.

To Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips.

You and each of you are hereby notified that the declaration, with a copy whereof you are now herewith served, and to which copy this notice is subjoined, will be filed on the 15th day of April next, being the second day of the next term of the district court, in and for Iowa county, Wisconsin Territory; that, upon filing the same, a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of such rule, and that if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in said declaration.

Dated this 22d day of March, A. D. 1845.

Yours, &c., MOSES M. STRONG,
Attorney for plaintiff.

And on which said declaration is endorsed as follows, to wit:

MINERAL POINT, *March 13th*, 1845.

To MOSES M. STRONG, esq.:

You are hereby authorized to commence an action of ejectment against Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, for the recovery of the possession of the east half of the northeast quarter of section No. five, of town. four north, range three east, in Iowa county, or for so much of the said tract as they are in possession of, and this shall be your authority for so doing.

Respectfully yours, &c.,
CHARLES BRACKEN.

District court for Iowa county, Wisconsin Territory.

CHARLES BRACKEN, vs. SYLVESTER B. PRESTON, William Kendall, William Nichols, and William T. Phillips. } Ejectment.

COUNTY OF IOWA, *to wit:*

Andrew J. Hewett, under sheriff of Iowa county, being duly sworn, doposes and says, that he did, on the 22d day of March, A. D. 1845, personally serve William Kendall, William Nichols, and William T. Phillips, defendants in this suit, who are the actual occupants of the premises for which this action is brought, each with a true copy of the declaration hereto annexed, and also a true copy of the notice in writing to the said declaration subjoined, and likewise hereunto annexed; and on the 22d day of March, A. D. 1845, I left, at the last and usual place of residence in this territory of Sylvester B. Preston, one of the said defendants, with one Mrs. Finely, of suitable age and discretion, to whom I explained the contents of the same, a like true copy of said declaration and notice; and further this deponent saith not.

A. J. HEWETT, *Under sheriff.*

Subscribed and sworn to before me, this 15th day of April, A. D. 1845.

GEO. W. JONES,
Clerk D. C. I. Co., W. T.

Whereupon the said plaintiff, by his attorney aforesaid, moved the court for a rule against the said defendants to plead to the plaintiff's declaration herein.

Afterwards, to wit, on the 16th day of April, of the term of April last aforesaid, came the parties, by their attorneys; and by the agreement of the parties, by their said attorneys, the defendants are ruled to plead to the plaintiff's declaration herein within twenty days.

Afterwards, to wit, on the 5th day of May, 1845, came the defendants, by their attorneys, Dunn, Jones, and Crawford, and filed, in the office of the clerk of said court, their demurrer, in the words and figures following, to wit:

United States district court, in and for Iowa county, Wisconsin Territory, to October term, A. D. 1845.

SYLVESTER B. PRESTON et als.,
ads.
CHARLES BRACKEN.

IOWA, *to wit:*

And the said defendants, by Dunn, Jones, and Crawford, their attorneys, come and defend the wrong and injury, &c., and say, that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants; and that they, the said defendants, are not bound by law to answer the same, and this they are ready to verify; wherefore, by reason of the insufficiency of the said declaration in this behalf, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them, &c.

DUNN, JONES, & CRAWFORD,
Attorneys for defendants.

Afterwards, to wit, on the 18th day of August, A. D. 1845, comes the plaintiff, by his attorney aforesaid, and files, in the office of the clerk of said court, his joinder in demurrer in the words and figures following, to wit:

District court, Iowa Co., W. T. To October term, 1845.

CHARLES BRACKEN,
vs.
SYLVESTER B. PRESTON et als.,

And the said Charles Bracken comes, by Moses M. Strong, his attorney, and says, that the said declaration and the matters therein con-

tained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said Charles Bracken, to have and maintain his aforesaid action thereof against them, the said defendants; and the said Charles Bracken is ready to verify and prove the same as the court shall direct and award; wherefore, inasmuch as the said defendants have not answered the said declaration, nor hitherto in any manner denied the same, the said Charles Bracken prays judgment, as in and by his said declaration he hath always prayed.

MOSES M. STRONG,
Attorney for plaintiff.

Afterwards, to wit, on the 22d day of August, A. D. 1845, comes the plaintiff, by his attorney aforesaid, and files, in the office of the clerk of said court, his petition for a change of venue, and also an order of the honorable Charles Dunn, judge of the first judicial district, Wisconsin Territory, in the words and figures following, to wit:

In the district court for Iowa county, Wisconsin Territory.

CHARLES BRACKEN,
vs.
SYLVESTER B. PRESTON, WILLIAM KENDALL, WILLIAM NICHOLS, and WILLIAM T. PHILLIPS. } In ejectment.

Petition for change of venue.

To the honorable Charles Dunn, chief justice of the supreme court of Wisconsin Territory, and presiding in the district court for the county of Iowa, in the first judicial district.

The petition of Charles Bracken, the above named plaintiff, respectfully shews, that, at the last term of the district court for the county of Iowa, begun and held on the second Monday of April, A. D. 1845, he commenced an action of ejectment against the above named defendants; that a rule was taken against said defendants to plead to the declaration filed in said case; and that said defendants have filed a general demurrer to the said declaration; and that the said petitioner has filed his joinder in said demurrer; and that said suit is now pending in the district court for said county of Iowa, upon the aforesaid issue of law arising upon said demurrer.

The said petitioner further shews and states, that he fears that he will not receive a fair trial of said cause in said county of Iowa, where said cause is pending, on account that the judge of the district court for said county of Iowa is prejudged against him.

The said petitioner further states that Hon. David Irvin, one of the associate justices of the supreme court, and presiding judge in the district court in the several counties comprising the second judicial district in said territory, owns the equal undivided third part of the tract of land to recover the possession of one-third of which the aforesaid action is brought, and is a tenant in common with the petitioner of the same.

The said petitioner therefore prays, that a change of venue in said cause may be ordered to some county in this territory where the cause above set forth does not exist, and will ever pray.

CHARLES BRACKEN.

TERRITORY OF WISCONSIN, *county of Iowa, ss:*

Personally appeared before the undersigned, clerk of the district court for the county of Iowa, Charles Bracken, the foregoing petitioner, and made oath that the facts set forth in the foregoing petition are true.

CHARLES BRACKEN.

Subscribed and sworn to before me, this 18th day of August, A. D. 1845.

HENRY L. DODGE,
Clerk D. C. I. C., W. T.

TERRITORY OF WISCONSIN, *Iowa county, ss:*

Ordered, that the venue in the case referred to in the within petition be changed to the county of Milwaukie, in the third judicial district, and that the clerk of the district court of Iowa county transmit a transcript of the record and the papers in said cause, as required by law.

Given under my hand this 20th of August, A. D. 1845.

CHARLES DUNN,
Judge first judicial district, W. T.

Afterwards, at a term of the district court begun and held at the court-house, in the county of Milwaukie, on the second Monday of November, A. D. 1845, to wit, on the first day of December, A. D. 1845, came the parties by their attorneys, and the demurrer of the defendants to the plaintiff's declaration being argued, it is considered by the court that the said demurrer be and is hereby overruled, with leave to the defendants to plead within twenty days or judgment.

Afterwards, to wit, on the 12th day of December, A. D. 1845, this cause was continued until the next term of said court.

Afterwards, to wit, on the twenty-second day of December, A. D. 1845, came the defendants by their attorneys, Dunn, Jones & Crawford, and J. E. Arnold, and filed, in the office of the clerk of said court, their plea, in the words and figures following, to wit:

SYLVESTER B. PRESTON, William Kendall, William T. Phillips, and William Nichols, ads. CHARLES BRAKEN. } District court, Milwaukie co., June term, A. D. 1846.

And the said defendants, by Dunn, Jones & Crawford, and Arnold, their attorneys, come and defend the force and injury, when, &c., and say that they are not guilty of unlawfully withholding the premises claimed by the plaintiff as alleged in the plaintiff's declaration, and of this they put themselves upon the country, &c.

DUNN, JONES & CRAWFORD,
J. E. ARNOLD,
Defendants' attorneys.

Afterwards, to wit, on the third day of June, A. D. 1846, came the parties, by their attorneys aforesaid, and filed in the office of the clerk of said court their stipulation, in the words and figures following, to wit:

CHARLES BRACKEN,
vs.
S. B. PRESTON and others,
in ejectment.

} Pending in the district court, Milwaukie county, Wisconsin ter.

Stipulation.

It is hereby stipulated and agreed that all depositions taken in the case of Charles Bracken et als. vs. S. B. Preston and others, in replevin, heretofore tried in Milwaukie county, may be used on the trial of the above entitled case, in the same manner that they might have been if they had been taken for the purpose of being used in the same, subject to all proper exceptions as to the relevancy and legality of the subject matter of any portion or parts of said depositions, and to the charge of the court on the legal effect of such parts of the testimony as may be excluded by the court.

And it is further stipulated and agreed that the defendants will admit on the trial, that at the time of the commencement of this suit they were in possession of the premises described in the declaration, and were withholding the possession from the plaintiff.

MOSES M. STRONG,
Attorney for plaintiff.
DUNN, JONES, & CRAWFORD,
Attorneys for defendants.

And now, June 17th, of the term of June first aforesaid, came the parties aforesaid, by their attorneys, Mr. Walker for plaintiff, and Messrs. Crawford and Arnold for defendants, and the cause being at issue, a jury was called, who came, to wit: Daniel Wells, jr., and Hiram Bigelow, and the panel being exhausted, by direction of the court, the sheriff returned Henry Shew, Michael Welch, Jonathan L. Burnham, Ransom Rice, Sylvester D. Cowles, Harrison Ward, Samuel Farmin, John W. Farror, Solomon Juman, and Silas Johnson, as talesmen, making twelve good and lawful jurors of the county, who being duly tried, empannelled, and sworn, and the trial progressing, the court adjourned to 8 o'clock to-morrow morning.

June 18, 1846. Court met according to adjournment, and the trial proceeded, and progressing through the day, and not finished, the court adjourned to 8 o'clock to-morrow morning.

June 19th, 1846. Court met according to adjournment, the jury in the box, who being charged by the court respectively do say, that they find for the plaintiff generally as declared by him, with six cents costs.

Afterwards, to wit, on the 19th day of June, of the same term, came the defendants, by their attorneys, and file their motion for a new trial, in the words and figures following, to wit:

District court, Milwaukie county, Wisconsin territory, of June term, A. D. 1846.

SYLVESTER B. PRESTON et als. ads. CHARLES BRACKEN. } In ejectment.

And now come the said defendants by their attorneys, and, after verdict, move the court for a new trial in this cause, for the following reasons, to wit:

1st. Because the court erred in overruling the demurrer to the declaration filed herein.

2d. Because there was no issue of fact joined in this cause.

3d. Because the court erred in overruling the objection to the depositions of William Henry and John Bracken, introduced on the part of the plaintiff.

4th. Because the court erred in admitting the receiver's receipt as evidence of title in the plaintiff, without sufficient and competent proof of its execution, when it was objected to by the plaintiff's counsel for other reasons.

5th. Because the court erred in refusing to admit in evidence the record of a recovery of judgment by these defendants against the said plaintiff and others, in the district court for Milwaukie county, W. T., at the November term, 1844, thereof, on which judgment an execution issued, and the land mentioned in the declaration was sold, according to law, by the sheriff of Iowa county, W. T., to one of the said defendants, and the subsequent acts of the said sheriff therein, and the duplicate certificate given by said sheriff to one of said defendants.

6th. Because the court erred in refusing to admit evidence of the local rules and regulations of miners in the Wisconsin lead mines, to show to the jury what the contract between the plaintiff and Andrew Rumfrey was, and a part of said contract, and to explain to the jury what was meant in said contract when the contracting parties referred to and made those regulations and rules a part of said contract.

7th. Because the court erred in excluding the evidence of a local and particular custom when offered by the defendants.

8th. Because the court erred in refusing to give the jury the instructions asked for by the defendants.

9th. Because the court erred in its instructions to the jury.

10th. Because the verdict rendered in this case is not in accordance with the provisions of the statute, and is not authorized by law.

11th. Because the verdict is contrary to law and the evidence given in this cause.

ARNOLD & DUNN, JONES & CRAWFORD,
Attorneys and counsel for defendants.

And now, June 20, 1846, comes the parties by their attorneys, and the motion for a new trial being submitted, it is considered by the court that the said motion be, and is hereby, overruled; and it is considered and adjudged by the court now here that the plaintiff recover the pos-

session of the premises mentioned and described in the plaintiff's declaration, and according to the aforesaid verdict, to wit, the one undivided third part of the east half of the northeast quarter of section number five, in township number four north, of range number three east, of the fourth principal meridian, with his costs about his said suit in this behalf by him expended; and a writ of possession, with execution for the said costs, is awarded.

Afterwards, to wit, on the 15th day of July, A. D. 1846, came the defendants by their attorneys, and filed in the office of the clerk of said court their bill of exceptions, in the words and figures following, to wit:

SYLVESTER B. PRESTON et alia ads. / CHARLES BRACKEN. } In ejectment.

Be it remembered that, heretofore, to wit, at the November term, A. D. 1845, of this court, the general demurrer of the defendants herein to the declaration of the plaintiff came on for argument; which said declaration, with the notice, plaintiff's authority to his attorney to commence the action, and the return of service to the same, are in the words and figures following, to wit: (see page .) And after argument by the counsel, the court overruled the said demurrer; to which decision of the court the defendants by their counsel excepted.

And afterwards, to wit, on the 22d day of December, A. D. 1845, the defendants, by their counsel, filed in the office of the clerk of said court their plea of general issue to the said declaration.

And afterwards, to wit, at the June term, A. D. 1846, of said court, this cause came on for trial by a jury, when the following proceedings were had in this cause, to wit:

The plaintiff's counsel offered to read, as evidence to the jury, the deposition of William Henry to prove the signature of Joseph Eneix, which was attached to an instrument purporting to be a receipt of the receiver of the land office at Mineral Point; to the reading of which deposition the defendant's counsel objected, for the reasons that the said deposition was not the best evidence of the facts therein contained, and because the plaintiff had not shown that due diligence was used to procure the testimony of Joseph Eneix; nor was it shown that the said Eneix was without the jurisdiction of the courts of Wisconsin Territory. The court overruled the objection and permitted the deposition to be read; to which decision of the court the defendants' counsel excepted.

The plaintiff's counsel then offered to read, as evidence to the jury, the deposition of John Bracken to prove the signature of the aforesaid receipt; to the reading of which the defendants' counsel objected, for reasons that it was but secondary evidence, and the deponent was an incompetent witness, in this, that he was the administrator of Lyman J. Daniels, deceased, who was the owner or tenant in common with the plaintiff and one David Irvine of the land described in the declaration, and offered to introduce proof that the deponent was such administrator,

but the court declined to receive proof thereof and overruled the objection, and permitted the said deposition of the said John Bracken to be read as evidence to the jury; to which decision of the court the defendants' counsel also excepted.

The plaintiff's counsel then offered to read to the jury, as evidence of the plaintiff's title to the lands described in the declaration, the instrument attached to the deposition of William Henry aforesaid, purporting to be a receiver's receipt, given by Joseph Eneix to the plaintiff, David Irwin, and Lyman Isbell Daniels, on the payment of certain money for the land described in the said declaration, which said instrument is in the words and figures following, to wit:

A.

RECEIVER'S OFFICE AT MINERAL POINT,
No. 998. *November* 18*th*, 1835.

Received from Charles Bracken, David Irwin, and Lyman Isbell Daniels, of Iowa county, Wisconsin Territory, the sum of one hundred dollars and twenty-nine cents, being in full payment for the east half of northeast quarter of section No. five, in township No. four, of range No. three east, containing eighty and $\frac{29}{100}$ acres, at $1.25 per acre.

$100 $\frac{29}{100}$. JOS. ENEIX, *Receiver*.

To the reading of which the defendant's counsel objected for the reason following:

1st. Because the plaintiff had not proved by competent testimony that Joseph Eneix ever was receiver, or that the instrument offered in evidence was genuine and signed by said Eneix.

2d. Because the land described in said instrument was mineral land, and that lead and copper ores had been discovered thereon.

In support of which second objection or reason, the defendants' counsel read, from the depositions of Amzi W. Comfort, answers to direct interrogatories numbered 2, 3, 4, 5, and 9, and answer to cross interrogatory number 3, which answers are in the words and figures following, to wit:

Question 2d, by defendants' counsel. Are you acquainted with the discovery of copper ore, made by Andrew Rumphrey in the spring of 1842?

Answer. I know where it is.

Question 3d. Do you know on what tract of land it is?

Answer. On the E. $\frac{1}{2}$ of the N. E. qr. sec. 5, town. 4, range 3 east.

Question 4th. For what purpose has it heretofore been, and is it now, valuable?

Answer. For mining purposes.

Question 4th. How long have you been in the mining country, and what has been your occupation?

Answer. I have been here nearly eight years, and my occupation has been mining and surveying.

Question 5th. Are you acquainted with the mining rules generally of taking and leasing mineral lands in the mining country?

Answer. I am; I have both given and taken leases.

Question 9th. Is or not the tract of land above referred to, to wit, the E. ½ of the N. E. ¼ of section five, town. 4, range 3 east, in Iowa county, Wisconsin Territory, mineral land?

Answer. Yes, it is; but there has been no discovery of lead made on it, although there has been of copper ore.

Question 3d, by plaintiff's counsel. Was the tract of land you have described held, owned, or unoccupied by any person or persons, as mineral grounds, previous to the winter or spring of 1842?

Answer. There *was* a few old diggings on it before, which were probably done before I came to the country. They did not seem to have ever furnished any ore.

The above question objected to by defendants' counsel.

The court overruled the objection, and permitted the instrument aforesaid to be read to the jury; to which decision of the court the defendants' counsel excepted.

The whole testimony in chief given to the jury, on the part of the plaintiff, was as follows, to wit:

TERRITORY OF WISCONSIN, *County of Iowa:*

In the district *county* of the United States for Milwaukie county, Wisconsin Territory.

CHARLES BRACKEN
vs.
SYLVESTER B. PRESTON, William Kendall, William T. Phillips, [and] William Nichols. } In ejectment.

The deposition of William Henry, who, being duly sworn according to law, doth depose and answer the following interrogatories as follows, to wit:

Interrogatory first, by the justice. Are you acquainted with the parties to the above entitled suit?

Answer. I am.

Interrogatory 2d, by the plaintiff's counsel. Who was known and acting as receiver in the land office at Mineral Point, Wisconsin Territory, during the month of November, 1835?

Answer. Joseph Eneix.

Interrogatory 3d, by the same. Are you, or are you not, acquainted with the handwriting of the said Joseph Eneix, and what means have you of knowing his handwriting?

Answer. I am acquainted with his handwriting. My means of knowing his handwriting is, that I have known him from the fall of the year 1834, and was frequently in his office, where he was doing business, while he resided at Mineral Point. I frequently saw him writing, more particularly in signing his name as receiver of public moneys.

Interrogatory 4th, by the same. Will you look at the receipt here-

unto attached, No. 998, marked A, dated Receiver's office at Mineral Point, November 18th, 1835, and signed Jos. Eneix, receiver, and say in whose handwriting is said signature?

Answer to 4th interrogatory. The signature is in the handwriting of Joseph Encix. To the best of my knowledge and belief, it is his genuine signature. WILLIAM HENRY.

Sworn to and subscribed this 12th day of November, A. D. 1845, at the office of the clerk of the district court in Mineral Point, Iowa county, W. T., before me.

HENRY WAGONER,
Justice of the Peace for Iowa county, W. T.

Deposition of Stephen Prideaux, No. 1.

CHARLES BRACKEN, DAVID IRVIN, and JOHN BRACKEN, administrators of the estate of LYMAN J. DANIEL, deceased,
vs.
WILLIAM KENDALL, SYLVESTER B. PRESTON, WILLIAM T. PHILIPS, and WILLIAM NICHOLS.

In the district court for Milwaukie county, Wisconsin Territory, now pending in replevin.

The deposition of Stephen Prideaux, who, being duly sworn, doth depose and answer the following interrogatories as follows, to wit:

Question 1st, by the justice. Are you acquainted with the parties in the above cause?

Answer. Yes.

Question 2d, by plaintiffs' attorney. Did you, or not, ever lease a lot of the plaintiff, or either of them, for the purpose of mining for copper ore; and if so, how was it situated with reference to the Andrew Rumfrey lot?

Answer. I took a lot of ground of Charles Bracken, one of the plaintiffs in the above suit, two hundred yards square, bounded west by Andrew Rumfrey's lot, on which said Rumfrey made a discovery of copper ore.

Question 3d, by same. What were the terms on which you took your ground? And if the contract was in writing, please produce it, and annex a copy to your deposition.

Answer. I did take an agreement of Bracken, of which the following is a copy:

I have this day authorized Stephen Prideaux, sr., to dig for ore on my lands on section 5, town. 4 north, range 3 east; he to have a lot two hundred yards, commencing at the east side of Andrew Rumfrey's lot, where he has his present copper ore diggins, and as soon as he strikes any ores, he is then to take his range either north or south of the whole now working on by him; he, on his part, is to work the ground steadily and in a manlike manner, to pay one-fifth of all ores in clean

and merchantable condition to me; also to give me or my agent the refusal of all his ores raised on his ground.

(Signed) CHARLES BRACKEN.
By JNO. BRACKEN.

April 1st, 1842.

Question 4th, by same. Did Andrew Rumfrey know on what terms you *you* took your ground?

Answer. Yes; Andrew Rumfrey was present when I made the contract with Bracken.

Queston 5th, by the same. Do you know anything of the terms on which Andrew Rumfrey took his ground? If so, state all you know about it.

Answer. All that I know about it is, that Rumfrey was present when I made the bargain for my ground, and was to have it on the same terms that Rumfrey had his. The terms of the above contract were stated in Rumfrey's presence, and he did not deny but that they were the same terms that he took his ground on.

To all of the above questions put by plaintiffs' attorney, the attorney for the defendants objected to.

Question 6th, by defendants' attorney. Of whom did you lease?

Answer. Of Charles Bracken.

Question 7th, by same. When did you lease?

Answer. About the first of March I agreed with Charles Bracken, but did not take an agreement in writing at that time.

Qustion 8th, by same. Why did you take this ground?

Answer. To dig for copper ore or any other mineral.

Question 9th, by same. How long have you mined in the country?

Answer. Seven years last June or July.

Question 10th, by same. Have you leased much; if yea, were your leases written or unwritten?

Answer. Yes; I have leased a good deal in this neighborhood; some were written, and some not. I think I have worked on more ground without a written agreement than with one.

Question 12th, by same. Are leases taken by mining rules transferable?

Answer. Unless but special agreement to the contrary, I think they are transferable.

Question 11th, by same. What is the custom of the country in giving leases and digging; writing or not?

Answer. I think the custom of the country is to give written agreements, when called for by the party taking the ground.

Question 13th, by the same. How long after Rumfrey and Phillips made their discovery did you lease?

Answer. I do not know, but some time before I took the ground of Bracken.

Question 14th, by the same. Why did you take a lease in writing?

Answer. Because I wished it to be in writing to prevent any difficulty if either or both of us should die.

Question 15th, by same. Did you not demand a writing for your lot of John Bracken, and was John the agent of Charles Bracken?

Answer. Yes; I did by the direction of Charles Bracken, and I believe John Bracken to be the agent of Charles Bracken for the purpose of leasing his mineral lands. STEPHEN PRIDEAUX.

TERRITORY OF WISCONSIN, *County of Iowa, ss:*

I hereby certify, that the above and foregoing deposition of Stephen Prideaux was taken before me, at my office, in the town of Mineral Point, Wisconsin Territory, on Monday, the 4th day of September, 1843, between the hours of nine o'clock in the forenoon and six o'clock in the afternoon; that said deposition was taken at the request of the plaintiffs, to be read in evidence on the hearing of the above entitled cause; that notice of the taking of the same was served on Francis J. Dunn, defendants' attorney, a copy of which is hereunto attached; and that he attended the taking of the same, and put cross interrogatories, and that said deposition was taken for the reason that the said witness, Stephen Prideaux, resides more than thirty miles from the place of the trial of said cause, to wit, in the county of Iowa, Territory of Wisconsin.

WILLIAM HENRY, *Justice Peace.*

Deposition of Stephen Prideaux, No. 2.

The deposition of Stephen Prideaux, sr., who, being duly sworn, doth depose and answer the following interrogatories as follows to wit:

Question 1st, by plaintiff's counsel. Are you the same person whose deposition was taken in the above entitled cause, before William Henry, on the fourth day of September, A. D. 1843.

Answer. I am.

Question 2d. Did you ever raise any copper ore on the ground you took of Charles Bracken; and if so, what did you do with it?

Answer. I did, and sold it to Charles Bracken.

Question 3d. What was your duty, under your contract with Charles Bracken, with reference to giving him the preference of the ore?

Answer. We were to give him word of it when it was fit for market, and, if he would give as much as any one else, he was to have it; and if any one was to offer us a price for it, we were to give him notice of it, and, if he would give as much, he was to have it.

Question 4th. Have either of the defendants said, in your presence, that Charles Bracken had refused to let them work the ground in question?

Answer. I do not recollect that *I* did.

Question 5th. Did you or not, at the time Bracken, Rumfrey, and yourself stepped off Rumfrey's lot, hear Bracken say, in Rumfrey's presence, any thing about the defendants having the ground; and if so, what was it?

(This question objected to by defendants' counsel.)

Answer. I heard Bracken say, at that time, that I must not let the copper company, meaning the defendants, come in to dig with me, for they were not to dig on his ground.

Cross interrogatories by defendants' counsel.

Question 1st. Are you by profession and occupation a miner, and are you acquainted with the rules governing mining in this country?

Answer. I am a miner, and I am acquainted with the rules of mining.

Question 2d. Have you frequently leased ground from and *two* others.

Answer. I have frequently leased ground from others, but have no land to lease to others.

Question 3d. Has it been your habit to work ground with verbal or written leases?

Answer. I have worked without written leases; more without than with.

Question 4th. In the common custom of leasing mineral lands, are the leases generally in writing or otherwise?

Answer. The custom is, that if you ask for writings you can get them; and people generally, where they strike any thing, get writings.

Question 5th. From whom have you ever taken a written lease?

Answer. From Mr. Prideaux, Bennett & Co., and from Charles Bracken and from Richard Martin.

Question 6th. When you lease mineral grounds from others, have you not a right to release or sub-let to others, unless there is some restriction made by the original lessor.

Answer. I do expect I have.

Question 7th. Is it not the every-day practice and rule in the lead mines, when land is taken to be worked of the landlord, that the lessee sells and disposes of to others, without consulting his landlord, and the landlord not question it?

Answer. It is the every-day practice and custom of the country.

Question 8th. State fully the mining rules and regulations, in these mines, on the subject of leasing and transferring, and particularly on the duty of a lessee who mines with the right to the landlord of purchasing his ores, provided he, the landlord, pays as much for them as any one else; and whether the rent mineral is not bound to be demanded by the landlord, unless there is an express contract to the contrary; and is it not sufficient if the tenant has the rent due at all times in readiness?

Answer. As to the rules and regulations as to leasing, I cannot state any thing more than I have already stated. In addition to what I have already stated I would say that, *that*, upon the landlord's offering his highest price, [if] I found I could obtain more of some one else, I should feel justified in selling it; but if he did not say it was his highest price, and I was to get a higher offer, it would be my duty to notify him of the offer, and sell to him if he would give as much. I do not think it is the duty of the landlord to demand the rent.

Question 9th. Have not the defendants, to the best of your knowledge, at all times worked the lot in dispute faithfully and to the best advantage?

Answer. I do not know.

Question 1st, by plaintiff's counsel. Do the rules and regulations of

this country, of which you have spoken, relate to mining for lead ore or copper?

Answer. The customs of which I have spoken relate more particularly to lead, but I know of no difference in the customs regulating lead or copper.

Question 2d. Is it or not of recent date that there has been mining to any extent for copper in this country?

Answer. It has been confined to a narrow extent of country, not exceeding *more than* a mile in extent, but there *has* been limited diggings upon that tract of country for several years; but, within a year or two, more extensive discoveries have been made.

STEPHEN PRIDEAUX.

TERRITORY OF WISCONSIN, *county of Iowa, ss:*

I hereby certify, that the above and foregoing deposition of Stephen Prideaux was taken before me, at my office in Mineral Point, Wisconsin Territory, on Monday, the 30th day of October, 1843, between the hours of two and four o'clock in the afternoon; that said deposition was taken, at the request of the plaintiffs, to be read in evidence on the hearing of the above entitled cause; that notice of the taking of the same was served on Francis J. Dunn, defendants' attorney, a copy of which is hereunto attached, and C. C. Washburn, esq., attended the taking of the same as attorney for the defendants, and put cross interrogatories; and that the said deposition was taken for the reason that the said witness, Stephen Prideaux, resides more than thirty miles from the place of the trial of said cause, "to wit," in the county of Iowa, Wisconsin Territory; that it was written by William T. Henry at my request, and under my direction. WM. HENRY, *J. Peace.*

Deposition of Stephen Prideaux, No. 3.

Question 1st, by justice. Are you acquainted with the parties in the above entitled suit?

Answer. Yes.

Question 2d, by plaintiff's counsel. Did you ever hear Charles Bracken say any thing in relation to the defendants digging copper on his ground; if so, when was it; what did he say; and what do you know of the defendants having a knowledge of that conversation?

(Objected to by defendants' counsel.)

Answer. When we came to the ground Rumfrey and others had commenced digging; this was in March, 1842; I wanted to get ground east of Rumfrey; Bracken went with me to the ground; Bracken had previously let Rumfrey have the ground; he said, Rumfrey, I let the ground to you; but you shall have nothing to do with the copper company; you are not to transfer it to any one without my liberty; you shall have the ground on paying a fifth; I will have the privilege of the ore on paying as much as any other man; he said the copper company (alluding to Kendall, Phillips, Preston, and Nichols,) should not dig on his ground; Phillips was present when he said they should not dig on his ground; I do not know that Bracken knew that Phillips belonged to the copper company; I do not know that others of the de-

fendants knew what Bracken said afterward; a month after the conversation, perhaps, I told all of them what the conversation was between Bracken and Rumfrey; I am positive I told them within a month.

Question 3. In whose name were the diggings worked when you informed the defendants of the conversation between Bracken and Rumfrey?

Answer. In Rumfrey's.

Question 4th. About how much ore had been raised at that time?

Answer. Not three hundred pounds.

Cross interrogatories.

Question 1st, by defendants' counsel. You say the statements of Charles Bracken were made after Rumfrey commenced working the ground; now, was he addressing Rumfrey?

Answer. Yes.

Question 2d. How do you know who Bracken meant by the copper company?

Answer. He told me before I came on the ground that neither I nor Rumfrey should have anything to do with Kendall & Co.; he told me that Kendall & Co. composed the copper company; in speaking of them he sometimes called them Kendall & Co., and sometimes the copper company.

Question 3d. Was there not copper ore on the ground raised by Rumfrey at the time of this conversation and was not Rumfrey then in possession of, and working the ground?

Answer. There was ore on the ground, and Rumfrey was in possession, and working the ground.

Question 4th. Did you ever hear any of the plaintiffs say before this conversation that Rumfrey had received permission to dig there?

Answer. Rumfrey was allowed to prospect there, and the terms were settled on the day that I went there.

Question 5th. Do you swear positively that there had not been more than 300 pounds of ore raised on the ground when the aforesaid conversation took place?

Answer. I do not swear positively. They had raised some little copper and buried it again, as they did not wish any person to see it until after they had taken the ground; I do not know how much they so raised and buried; it was 300 pounds, according to the best of my knowledge and belief.

Question 6th. Would you swear that they did not raise three thousand or thirty thousand?

Answer. There was no more than 300 pounds in sight.

STEPHEN PRIDEAUX.

Deposition of Stephen Prideaux, No. 4.

Stephen Prideaux, senior, a witness introduced on the part of the plaintiff in the above entitled case, being sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says, in answer to the following interrogatories:

1st question, by the justice. Are you acquainted with the parties, plaintiffs and defendants?

Answer. That he is.

Question by plaintiff. Are you acquainted with the east half of the northeast quarter of section number five, of township number four, of range number three east, in Iowa county? If so, state who is in the occupancy and possession of it, and how long they have been in the occupancy and possession.

Answer. I am acquainted with it, and have seen it surveyed; and that William Kendall, William Nichols, William T. Phillips, and Sylvester B. Preston are in possession of said tract, and have been in possession of it since April, eighteen hundred and forty-two.

Question by plaintiff What has been the nature of their possession?

Answer. Digging for copper ore.

STEPHEN PRIDEAUX.

Deposition of James Wasley.

James Wasley, a witness introduced on the part of the plaintiff in the above entitled case, being sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says, in answer to the following interrogatories:

1st question, by the justice. Are you acquainted with the parties, plaintiff and defendants?

Answer. That I am.

Question by plaintiff. Are you acquainted with the east half of the northeast quarter of section number five, township number four, of range number three east, in Iowa county? If so, state who is in the occupancy and possession of it; and how long they have been in such occupancy and possession?

Answer. I am acquainted with said tract, and that William Kendall, William Nichols, William T. Phillips, and Sylvester B. Preston are in possession of said tract, and have been for about three years, engaged in mining for copper ore; and that I commenced digging on said tract, by permission of Charles Bracken, about two years since; and they forbid my digging on same.

JAMES WASLEY.

Deposition of John Bracken.

John Bracken, a witness introduced on the part of the plaintiff in the above entitled case, being sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says, in answer to the following interrogatories:

Question 1st, by justice. Are you acquainted with the parties, plaintiff and defendants?

Answer. I am.

Question by plaintiff. Are you acquainted with the east half of the northeast quarter of section number five, township number four, range number three east, in Iowa county? If so, state who is in the occupancy

and possession of it, and how long they have been in such occupancy and possession.

Answer. I am well acquainted with the tract, and have assisted in surveying it; I know that Sylvester B. Preston, William Kendall, William Nichols, and William T. Philips were in possession, last April and May, of part of said tract of about two hundred yards square, in mining for copper ore, and were in possession of it from March or April, A. D. 1842, up to that time; and have continued to keep their mining tools on the same until the last time *which* I was on the ground, which was a few weeks ago.

Question by plaintiff. Do you know anything about a receiver's *recpt* for said tract? If so, state all you know about it; the number, date, description, and by whom signed; what you know as to its genuineness, what you last saw of it, and all you know about it.

Answer. I know that during the taking of depositions before William Henry, esquire, in a suit of replevin between Charles Bracken et al., plaintiff, and these defendants, which was pending in Milwaukie county district court, that the receiver's receipt for the said east half of the northeast quarter of section number five, town. number four, range number three east, in Iowa county, was placed in the possession of said justice, and attached to one of the depositions, and sent to Milwaukie to be used in evidence in said trial, and signed by Joseph Eneix, receiver; I am well acquainted with Joseph Eneix's handwriting, and have seen him write; and, to the best of my recollection and belief, that the signature to said receipt was Joseph Eneix's handwriting; and to the best of my recollection the number to said certificate was nine hundred and ninety-eight, and the date of it was November the 18th, 1835.

Question by plaintiff. Was or was not Joseph Eneix acting as receiver of public moneys at the land office in Mineral Point, Wisconsin Territory, on the 18th day of November, 1835, and for some time before and afterwards?

Answer. I know nothing more than hearsay previous to June, 1836; at that time he was.

JOHN BRACKEN.

Answers 2, 3, *and* 4, *of Lot Harris's deposition.*

Question 2d, by plaintiff's attorney. Are you acquainted with the copper discovery made by Andrew Rumfrey, on what is called the Rumfrey lot, on the E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of sec. 5, in town. 4, of range 3 east, worked by the defendants?

(Question objected to by defendants' counsel.)

Answer. I am acquainted with it.

Question 3d, by the same. *Was* you ever at the diggings on that lot in company with the parties to this suit, or any of them; if so, when was it, and which of the parties were present?

Answer. I have been on the lot in July, 1842, near the first of July; do not recollect the day of the month; William Nichols, William Phillips,

and William Kendall were on the ground; John Bracken and Charles Bracken were also there.

Question 4th, by the same. Did you hear any conversation between the plaintiffs, or either of them, and the defendants, or either of them, in relation to digging for copper on that lot? If so, state what the conversation was.

(Question objected to by defendants' counsel.)

Answer. I heard John Bracken forbid them to work there, that he had possession, and tell them to cease digging on the lot; by them I mean Kendall, Phillips, and Nichols; Nichols, Phillips, and Kendall contended that they would work the ground; they went over to remove a windlass placed on the hole by Bracken and myself, and placed another windlass upon it; they went on to work, and that is about all I know of it.

Answers 4 and 6 of the depositions, No. 3, of James Wallace, jr.

Question 4. *Was* you present at the conversation between the parties about which Lott Harris testified in his deposition?

(Objected to by defendants' counsel.)

Answer. Yes.

Question 6th. State what the conversation was, mentioned in the preceding 4th question; state, also, who was present.

Answer. Charles Bracken, John Bracken, Lott Harriss, William Nichols, John Prideaux, Edward Prideaux, William Kendall, William T. Phillips, Joseph Stevens, and myself were present; Charles Bracken said to William Kendall, William Nichols, and all that were there, that they must not dig on that ground any more.

Answers 2 and 3 of the deposition of Edward Prideaux.

Question 2d, by plaintiff's counsel. Did you hear the deposition of Lott Harris, taken this day? If so, state whether you were present at the conversation spoken of by him.

(Objected to by defendants' counsel.)

Answer. I heard Lott Harris's deposition, and was present at the conversation alluded to.

Question 3d. State the conversation you heard, at this time, between Charles or John Bracken and the defendants.

Answer. Before I came to the hole, Charles Bracken went away; I heard John Bracken say, that Charles Bracken had taken possession, John Bracken stated this to Kendall's hired men, and that they must hold on until Charles Bracken came; in a few minutes Charles Bracken came on the ground with Lot Harris, and gave him possession of the diggings. A few minutes afterwards, William Kendall came on the ground, and Charles Bracken said to him, "I'm on the ground before you, this morning, Mr. Kendall; I have taken possession of the diggings, and you must not disturb them." Kendall asked Bracken what authority he had for doing so. Bracken said his authority was, the ground was his; he had taken peaceable possession, and did not want

to be disturbed. Kendall said to his men, "come boys, let us put on the windlass and go to work." They went to put on the windlass, and Charles Bracken then drew a pistol, and said he would hurt one of them if they put the windlass on. Bracken said to Kendall, I believe, that he had told him last fall he should not work there. Kendall said, "I know the reason, it is because I would not let you have a load of copper ore I had promised to Spanzenbury. Bracken said to Kendall and Nichols repeatedly, they should not work his ground.

Answers 2d and 3d of A. W. Comfort's deposition relating to the survey of the land and the stipulation on file.

Question 2d, by plaintiff: Are you the district surveyor for Iowa county, and if so, how long?

Answer. I am, and have been since the 1st of January, 1842.

Question 3d. Are you acquainted with the ground or copper diggings respecting which this suit is brought? If so, state where it is situated.

Answer. I am acquainted with the ground and diggings, it is situated on the east half of the northeast quarter of section five, town[ship] four, range three east, of the fourth principal meridian, in Iowa county, Wisconsin Territory.

After the reading of which, the plaintiff's counsel rested his case.

Defendants' counsel then offered the deposition of Curtis Beach, to show a grant to Andrew Rumfrey, through whom the defendants claim the right of possession, which offer was objected to by plaintiffs. The objection was overruled, and evidence admitted, subject to reservation.

Interrogatories 1 and 2, and the answers thereto, were read to the jury.

Question 1, by the justice: Are you acquainted with the parties in the above entitled cause?

Answer. I am.

Question 2, by defendants' counsel: Do you know any thing about the matter in dispute between the above parties? And if so, state all you know about it.

Answer. I know that some time in the winter or spring of 1842, that Andrew Rumfrey and Charles Bracken were in my store; that Andrew Rumfrey remarked to Mr. Bracken, that he wanted to dig on his land; Mr. Bracken answered very well, Andrew, you can go and dig; Mr. Bracken remarked to him, that he wanted the mineral, (or something like that.) I believe that Andrew replied, I suppose you will give as much as any one else, (do not recollect the exact words, but something to that effect.) I believe, or in fact I have no doubt, that Mr. Rumfrey asked for the writings; Mr. Bracken replied, that here *was* witnesses, there *was* two or three in the store.

The defendants' counsel then read in evidence (subject to objection) the deposition of Andrew Rumfrey, including interrogatories and answers, from 1 to 9 inclusive, and cross interrogatories, from 1 to 5 inclusive.

Question 1st, by the justice. Are you acquainted with the parties in the above entitled cause?

Answer. Yes.

Question 2d, by plaintiffs' counsel. Are you acquainted with the copper discovery worked by the defendants, and the ground on which it is situated?

Answer. I am; but do not know the number of the lot.

Question 3d. Who made the discovery?

Answer. Myself and William T. Phillips.

Question. What was the contract under which you were working at the time you made the discovery? State the bargain, when and where it was made, and all you know about it.

Answer. I believe it was in Mr. Beache's store; it was first with Mr. John Bracken. I met John Bracken in Mr. Beache's store, and he told me he had a notion to go and prospect for copper; I told him I wanted to take a piece of land from his brother, and also a piece from the copper company he was agent for. I asked him whether he would go with me to prospect for copper, and he told me that he would. Afterwards, on the sixth or seventh day of March, A. D. 1842, I met with Mr. Charles Bracken in Mr. Beache's store; I asked him whether the piece of land I wanted was the piece which William Henry was promised, and he said no. I asked him whether I could have it, and he said yes. I asked him the terms that he would let his land, and he told me he would let it for a fifth, and give him the privilege of the copper; and I said, providing you will give as much as any other person; and I believe the only word he made in reply was, certainly; about the limits of the land we did not finally agree there; but he promised to meet me on the ground; about four or five weeks after the time I took the land of Mr. Bracken, he met me on the ground; when he met me on the ground, they hauled me up out of the shaft, and he said, Andy, what way do you want your limits; and I was standing on the pile of dirt and said, I will take two hundred yards east from that stump, (pointing to it,) one hundred yards north, and one hundred yards south from this hole; well, we started from the stump, and travelled two hundred yards east, myself, Stephen Prideaux, sen., and Charles Bracken. I should think from where we first made the discovery, the stump was thirty or thirty-five steps west; nothing further was said at that time in relation to the terms on which I was to have the land. Immediately after I had taken the land from Mr. Charles Bracken, Mr. John Bracken came into the store, and he let me the piece of land which we had been talking about belonging to the copper company, which was west of the piece I had taken of C. Bracken. I then asked him whether he wanted to join as a partner with me on the piece of land I had taken of his brother, and he said no.

Question 5th. Did John Bracken tell you that you *was* not to sell without their consent?

Answer. He did not, that I can remember of.

Question 6th. When you took the ground from Charles Bracken, did

you take it for your own especial use and benefit, or for the benefit of any other person? State fully all about it.

Answer. When I took it, I thought I took it for Mr. John Bracken and myself; but, when he declined being a partner with me, it was entirely at my own disposal.

Question 7th. Did you or not, before you commenced working the ground, agree with the defendants to work the ground for wages for their benefit?

Answer. I did not.

Question 8th. Did you ever, at any time, make such an agreement with them; and, if so, when?

Answer. I did, about three or four weeks after I took the land, in Mr. Beache's store, and about a week previous to the stepping off of the land, make such an agreement with the defendants.

Question 9th. Did you ever tell the plaintiffs, or either of them, that you had transferred your right to defendants; if so, when?

Answer. John Bracken came down into the hole, and I told him that Mr. Phillips had got half of the discovery, and that I was about closing a bargain for the other half; but I had made an agreement with the defendants about a week previous to this time.

Cross interrogatories.

Question 1st. Who did you take on with you as a partner when you went to work, and who was with you when you made the discovery; and was not Bracken frequently on the ground before, and about the time, you made the discovery, and saw your partner at work there; and did he object to it; until the time he struck you, or offered to strike you, state nothing about what Bracken said when he quarrelled with you?

Answer. I took on Wm. T. Phillips, one of the defendants; and he was with me when I made the discovery; I don't think he, Bracken, was there until several days after we made the discovery; I think I saw him on the ground about four times from first to last; I suppose he must have seen my partner there; and he never did object to his working there until he came there on the day, or the day following, after John Bracken had been there, as spoken of above.

Question 2d. Did you not work the ground according to the contract when you were upon it?

Answer. I did work the ground according to the contract; I never did offer him any ore, as I stated above, but I invited him to come and take a sample of the ore which we had ready.

Question 3d. Was it necessary that the ore should be sampled before a value could be set upon it, and be ready for market?

Answer. It was.

Question 4th. Did you leave the premises immediately after notifying him that it was ready to sample?

Answer. I did.

This question objected to by plaintiff.

Question 5th. Did not the defendants, to the best of your knowledge,

work the ground up to the time of the commencement of this suit according to your contract with Bracken?

Answer. They did, according to the best of my judgment of mining.

Defendants' counsel then read, (subject to same objections,) the deposition of Curtiss Beach, including interrogatories and answers No. 3, 4, 5, 6, 7, and cross interrogatories No. 1, 2, 3; also re-examination No. 1, 2, 3; and questions and answers No. 1, 2, 3, and 4, of John Bracken, therein contained.

Deposition of Curtis Beach.

Question 3d, by defendants' counsel. What was the conversation between you and Charles Bracken, one of the plaintiffs, in relation to the copper ore that had been raised by the defendants from and off the copper lead that Andrew Rumfrey had discovered in the neighborhood of Mineral Point?

Answer. I recollect, in a conversation I had with Mr. Bracken, that he wanted the rent minerals divided as they drew it away; that he was unwilling to have it divided by putting it in two piles; that is, one-fifth in one pile, and four-fifths in another.

Question 4th. Refer to the testimony given before by you, touching to the same matter between the plaintiffs and defendants in this suit, and see if it brings to your recollection anything that may have escaped your memory at this time; and, if so, state it.

This question objected to by plaintiffs' counsel.

Answer. I mentioned to Mr. Bracken that *that* they were willing to give or take sixteen dollars; do not recollect what answer Bracken made.

Question 5th. Previous to the last conversation, above referred to, between yourself and Bracken, was or not objections made by Bracken to the defendants working the copper lead that had been discovered by Andrew Rumfrey on what the plaintiffs claimed to be their land?

Answer. Never made any objection to my knowledge.

Question 6th. Had or not one of the plaintiffs, Bracken, previous to the time above referred to, frequent conversations with you about the copper lead above referred to?

Answer. We frequently had conversations about it.

Question 7th. When was the conversation had between yourself and Bracken in relation to the division of the ores?

Answer. As near as I can recollect, it was some time in July, 1842.

Cross interrogatories by plaintiffs' counsel.

Question 1st. Was Richard Crocker present at your store at the conversation between Charles Bracken and Andrew Rumfrey, in relation to digging on the ground?

Answer. I should think that he was in the store.

Question 2d. Was Charles Bracken aware that the defendants had purchased out Rumfrey at the time of your conversation with him?

Answer. I do not know that he was.

Question 3d. *Was* you aware of it?

Answer. I was aware of it in part of the conversations we had; in some of the first conversations I was not; I was aware of it at the conversation when I told Mr. Bracken that they would give 16 dollars for it; and supposed that every one was.

Re-examination of Curtiss Beach.

Curtis Beach recalled by defendants' counsel.

Question 1st. Had you, as agent or otherwise, any connexion or control with or over a copper ore discovery made by Andrew Rumfrey, or the ores raised therefrom? And, if yes, state what it was, and at what time.

Answer. Judge Irwin and Mr. Bracken came into my store, and Judge Irwin requested me to act as his agent in receiving his dues; and I did so for a short time, when some one else acted as agent in my place; I think it was some time [in] June or July, 1842.

Question 2d. What did you do while acting for David Irwin?

Answer. The only act I did was to send Mr. Tilley over to see the ore was divided right, one-fifth in one pile and four-fifths in another.

Question 3d. Why did you send Mr. Tilley over to see the ore divided?

Answer. Kendall & Co. told me they were going to divide the ore, and requested me to send some one over to see that it was done right; and did so, as I felt under obligation, as Judge Irwin's agent, to attend to it.

Question by Charles Bracken, one of the plaintiffs. When Judge Irwin and myself called at your store, which of us spoke to you first upon the subject of his dues?

Answer. Mr. Bracken, I should think, was the first man that mentioned it.

Question 2d. Was not the remark made by me, that I was to pay over to you the dues of Judge Irwin from that ground?

Answer. I do not recollect any such expression; but my impression was that Mr. Bracken was to have the mineral, and that Judge Irwin's part was to be paid me in money.

Question 3d. Did I or did I not forbid you from attending to or having [any] thing to do with the division of those ores?

Answer. Did not.

Question 4. Did you or not, after the division of ores that you have spoken of, admit to Mr. Charles Bracken that you supposed you *was* authorized, by your agency for Judge Irvine, to attend to the division, but that you *was* satisfied you *was* not, or something to that effect?

Answer. No recollection of making any such admission.

Defendants' counsel then read (subject to same exceptions) the deposition of John Prideaux, including interrogatories and answers No. 1 to 6 inclusive, and No. 11.

Question 1st, by the justice. Are you acquainted with the parties in this suit?

Answer. I am acquainted with all except Judge Irwin.

Question 2, by defendants' counsel. Are you acquainted with the lot of ground near Mineral Point, on which Andrew Rumfrey made a discovery of copper ore some time in the spring of 1842?

Answer. I am.

Question 3d. Who has worked it since the discovery was made?

Answer. I believe William Kendall and company.

Question 4th. Who do you mean when you say William Kendall & Co.?

Answer. I mean William Kendall, Sylvester B. Preston, Wm. T. Phillips, and William Nichols.

Question 5th. Did you take a lot from Charles Bracken, near the one on which Rumfrey made the discovery; and if so, what distance was it from Rumfrey's?

Answer. Yes, I took a lot from Mr. Bracken, 200 yards east of Rumfrey's lot.

Question 6. What *was* the terms on which you took the lot from Charles Bracken, and what was the conversation between you and him on the subject?

Answer. I was to pay one-fifth to the ground, and I was to let Mr. Bracken have all the ores I should raise on the ground, provided he gave me as much as any one else would. I asked of Mr. Bracken, whether there was any necessity of having an article in writing? He said there was not. He said that the mining rules were so plain, that there was no need of having an article. He said that that was the same way in which Andrew Rumfrey took his ground, and also my father.

Question 11th. Were or were not the defendants at work upon the ground constantly up to the time Bracken sued them, and from the time they purchased of Rumfrey?

Answer. I was passing by there almost daily for two months, and there was plenty of hands at work there.

(Also subject to the same exception.) Deposition of Amzie W. Comfort, No. 2, including interrogatories and answers No. 1 to 5 inclusive, and No. 9.

Question 1st, by the justice. Are you acquainted with the parties in this suit?

Answer. Yes.

Question 2d, by defendants' counsel. Are you acquainted with th discovery of copper ore made by Andrew Rumfrey in the spring o 1843?

Answer. I know where it is.

Question 3. Do you know on what tract of land it is?

Answer. On E. ½ of the N. E. qr. sec. 5, town. 4, range 3 east?

Question 4th. For what purposes has it heretofore been and is it now valuable?

Answer. For mining purposes.

Question. How long have you been in the mining country, and what has been your occupation?

Rumfrey remarked to Bracken that he wanted to dig on his land. Mr. Bracken replied, very well, Andrew, you can go there and dig; but Mr. Bracken said he wanted the mineral; Rumfrey replied, that he could have it if he would give as much as any one else. I do not recollect that there was any thing further said at that time.

[Question] 2d. State what Preston told you in relation to a certain lot of ore, and what the conversation was between you and him, and at what time it occurred.

Answer. Some time during the month of June, I think about the 20th or the 25th, Mr. Preston said to me he was willing to give or take $16 a thousand for the lot of ore then on hand. I understood, by what he said, that he (Preston) was willing to give that price for the one-fifth, or sell four-fifths for the same price. I made known the declaration of Preston to Charles Bracken about the same time.

Question 3d. Did either of the defendants tell you, or ever give you to understand, that Bracken was to have the preference in purchasing the ore, provided he would give as much as any one else?

[Answer.] I recollect of no particular conversation, but I was always given to understand that such was [the] contract.

Also (subject to the same exceptions) deposition of Richard Crocker, No. 1 to 6, inclusive.

Question 1st, by justice. Are you acquainted with the parties in the above entitled cause?

Answer. Yes.

Question 2d, by defendants' counsel. State all you know in relation to the above suit.

Answer. The conversation between Andrew Rumfrey and Charles Bracken, which I heard, I believe, in February or March, 1842; Mr. Rumfrey said to Charles Bracken that he wanted to dig on his ground. Mr. Bracken said, in reply, that he might go and dig on it, but if he got any thing he wanted it. Mr. Rumfrey asked Mr. Bracken if he would give as much as any body else. Mr. Bracken replied that he would.

Question 3d. Was there any particular ground mentioned?

Answer. No.

Question 4th. What business are the defendants engaged in?

Answer. They are smelters of copper ore, and have been from one to two years.

Question 5th. Did Bracken give Rumfrey any authority to transfer his privilege of digging to any other person?

Answer. No; I did not hear him give any.

Question 6th. Have you stated all the conversation between Bracken and Rumfrey, and *was* you requested to recollect it, and by whom?

Answer. I have stated all that I recollect. Mr. Rumfrey requested me at the time to bear it in mind, immediately after Mr. Bracken had left.

Also deposition of Stephen Prideaux, taken by plaintiff, No. 1 to 3, inclusive, and No. 5 and 15.

(This deposition copied above.)

Also (subject to same exception) the deposition of Jackson Richardson, No. 1 and 2.

Question 1st, by the justice. Are you acquainted with the parties in the above entitled cause?

Answer. Yes.

Question 2d, by defendants' attorney. Did you ever see the writing which is now presented to you before, and which is attached to this interrogatory?

Answer. I cannot swear positively that I have, or that this is a correct copy; I served a notice similar to this on Charles Bracken from Preston & others notifying him that there was some copper ore ready for sampling on or about the date of this paper.

The defendants' counsel then offered to read to the jury as evidence the proofs of what the rules and regulations of the mines and miners in the lead mines in Wisconsin Territory was, and is from depositions on file, for the purpose of showing to the jury what the true meaning of the contract between the plaintiffs and Andrew Rumfrey was, (which contract was already in evidence, and as a part of said contract; but the court, on the objection of the plaintiffs' counsel, excluded the evidence of any local custom, rules, and regulations, to which decision of the court the defendants' counsel excepted. The defendants' counsel then offered to read in evidence to the jury—not by way of disclaimer of the plaintiff's title, but to enable the jury to find the estate of the plaintiff's property, and specify the same in their verdict as required by the statute, and to whom, that, if entitled to anything, he was only entitled to the possession)—the record of a judgment rendered against the plaintiffs, together with David Irwin and John Bracken, as administrator of Lyman J. Daniels, and [in] favor of these defendants;—in this court a writ of fieri facias issued on said judgment, directed to the sheriff of Iowa county, Wisconsin territory, by virtue of which the land described in the plaintiffs' declaration was sold at auction in due form of law to one Francis J. Dunn, and William Kendall, one of the said defendants—the certificate of sale of the said sheriff to the said purchasers of said land, and the evidence of proceeding on said writ of fieri facias.

And said sale being in due form of law. But the court, on the objection of the plaintiffs' counsel, refused to permit said evidence or record to be read to the jury, for the reason that it was inadmissible evidence in this case; to which decision of the court the defendants' counsel excepted. The defendants' counsel then rested their defence; whereupon the plaintiffs' counsel read as rebutting testimony the answers of Andrew Rumphrey to the interrogatories number 3, 10, 11, 12, 13, 14, 16, cross interrogatories number 4, and his last answer; which several answers are in the words and figures following, to wit:

Question 3d. Who made the discovery?

Answer. Myself and William T. Phillips.

Question 10th. Why did you not tell John Bracken at that time that you had transferred all your interest to the defendants?

Question 11th. Did or did not Charles Bracken see you the same day that John was in the hole, or the next day; and, if , did he or not notify you not to transfer your privilege on the ground?

The above question objected to by defendants' counsel.

Answer. He did.

Question 12th. Did Charles Bracken know then that you had made the transfer?

Answer. Not to my knowledge.

Question 13th. How long after the transfer to the defendants was it that you had these conversations?

Answer. About a week.

Question 14th. Did or did you not always hold the idea to Charles Bracken and Judge Irwin that you still owned the ground up to the time when the 1st pile of ore was washed up and ready for sampling?

The above question objected to by defendants' counsel.

Answer. I did to one half; the other half was held by Phillips, as a partner.

Question 15th. Did not Judge Irwin tell you that you were not to sell or transfer the ground to any person or persons; and if so, state all he said at that time.

The above question objected to by defendants' counsel.

Answer. Judge Irwin asked me whether I recollected the conversation I had had with Mr. Charles Bracken; I told him that I did; he said that his opinion coincided with that of Mr. Charles Bracken; either one or the other said that provided I was to die to-morrow the copper company would have no claim to the land which I had leased of Mr. Charles Bracken; Judge Irwin and Charles Bracken knew nothing of any transfer to the defendants at that time, except what they learned from my previous remark to John Bracken, that I was about to bargain my half to them; they both told me at that time distinctly that the defendants were to have nothing to do with it, and I did not inform them that I had made any transfer; it was several weeks after John Bracken was down in the hole, but before any suits had been commenced about the ground.

Question 16th. Did you ever offer Charles Bracken the preference of the ores according to the contract, or [at] any price?

Answer. I never did.

Cross interrogatories.

Question 4th. Did you leave the premises immediately after notifying him that it [was] ready to sample?

Answer. I did. This question objected to by plaintiff.

Question by plaintiffs' counsel. Did you ever have any authority from Bracken to transfer your rights?

Answer. I never had. (This question objected to by defendants' counsel.)

This being all the testimony introduced, this cause was argued by counsel for plaintiffs and for defendants. The defendants' counsel asked the court to instruct the jury as follows, to wit:

1st. If the jury believe from the evidence that the defendants occupied the land generally, then such occupancy enured as a tenancy from year to year, and the defendants were entitled to a notice to quit, without which the plaintiffs cannot recover.

2d. If the jury believe from the testimony that in the agreement or contract between Bracken & Rumfrey the intention of one of the parties was to quit possession, and of the other to take or acquire it, that is to say, if Rumfrey intended to get or procure from Bracken possession of the land for mining or other purposes, and Bracken intended to give it, then such agreement or contract would be construed as a lease, but not being in writing it was void.

3d. If the jury believe from the testimony that a lease by parol was given by Bracken to Rumfrey, that parol lease being for an indefinite time, although void for any longer time than one year, operates to vest in Rumfrey a tenancy from year to year.

4th. That the contract between Bracken and Rumfrey was a lease.

5th. That the contract or lease to Rumfrey was assignable or transferable, and the defendants by transfer could stand in the place of Rumfrey, subject to perform his covenants.

6th. That the defendants' occupation of the land under a void lease, or generally with the knowledge of Bracken, from April, 1842, until the commencement of this suit, entitles them to a notice to quit.

7th. That the plaintiffs cannot recover without showing a regular notice to quit given to the defendants.

8th. That although the plaintiffs being notified in August, 1842, of the division of ores, replevied that amount of ores then on the ground; yet if the jury believe from the testimony that the plaintiffs or his co-tenant, David Irvine, or the agent of either, divided and received rents in June or July previous, then these are facts from which the jury may infer the existence of a tenancy.

The first instruction was reduced to writing and asked by the defendants' counsel on the evening of June 18th, 1846, after the arguments were closed, and before the court charged the jury. It was then considered advisable, from the late hour and the numerous depositions before the jury, to adjourn until the ensuing morning, which was accordingly done. On the next morning, (Friday, June 19th, 1846,) the jury re-assembled, and the court was about to charge them, when the defendants' counsel submitted the remaining and foregoing 7th instruction, and asked the court to give them in charge to the jury; the plaintiffs' counsel also asked instructions, which he presented, to be given to the jury; but the court, deeming the presenting and asking instruction at that time as too late and "out of time," refused to give the instruction asked for

by the defendants, except the first; which was given in charge to the jury as asked.

The court then charged the jury, among other things, as follows, to wit: The receipt in evidence, in proper evidence of title for the plaintiffs, unless the land were held, owned, or occupied as mineral ground at the date of said receipt or entry, and on which discovery of lead or copper ore shall have been made; the mere discovery of copper ore, since the entry and date of the receipt, does not affect the receipt.

The contract between Bracken, the plaintiff, and Andrew Rumfrey, is not a lease transferrable by Rumfrey to the defendants, or any other person, without the consent of Bracken. Either party could terminate that contract on proper notice. An assignment, or parol transfer, by Rumfrey, without the consent of Bracken, and Rumfrey, in pursuance thereof, leaving and giving over the possession of the premises to the defendants, terminates the contract on the part of Rumfrey. If the defendants were in possession with consent of the plaintiff, a notice to quit would be necessary; but no particular form of notice is necessary. On this point the jury is referred to the deposition of Lott Harris, Edward Prideaux, Comfort, and others. And, if such notice is made to appear, and the defendants continue thereafter in possession, this action will lie against them. If the defendants obtained possession of the premises wrongfully, and by fraud, a notice to quit is not necessary, unless the possession was ratified or approved by the plaintiff.

If the plaintiff took or accepted a share of the mineral, without full knowledge that the defendants were holding in their own right, was assignees of Rumfrey, such a transaction does not raise a presumption of plaintiff's consent to their possession. The plaintiff's taking all the mineral on the ground, at the time he had the writ of replevin executed, does not raise a presumption of consent on the part of the plaintiff to the defendants' possession.

The jury, having been thus charged by the court, returned into court with their verdict, in the words and figures following, to wit: "They find for the plaintiff generally as declared by him, with six cents cost." And thereupon the counsel for the defendants filed in court a motion for a new trial; which motion was as follows:

(Motion for a new trial inserted above.)

A copy of which motion was, on the 19th day of June, 1846, duly served on the plaintiff's attorney. The court, without argument, overruled the motion, and entered up judgment for the plaintiff on the verdict aforesaid.

To all which rulings, decisions, refusals, and instructions aforesaid of the court aforesaid, the defendants by their counsel except; and pray that this their bill of exceptions may be signed and sealed, and made a part of the record in this cause. And it is done accordingly.

This bill sealed at the request of defendants' attorney, this 15th day of July, A. D. 1846.

Signed, A. G. MILLER, [SEAL.]
Judge.

TERRITORY OF WISCONSIN, *Milwaukie county, ss:*

I, Cyrus Hawley, clerk of the district court in and for the county and territory aforesaid, do hereby certify, that the above is a true and correct transcript of the record and proceedings in the above entitled cause as appears of record.

In testimony whereof I have hereunto set my hand, and affixed the [L. S.] seal of said district court, this twelfth day of June, A. D. 1847.

CYRUS HAWLEY, *Clerk.*

And afterwards, to wit, on the 19th day of July, A. D. 1847, the said Sylvester B. Preston et als., plaintiffs in error as aforesaid, by their attorneys aforesaid, filed in the clerk's office aforesaid their assignment of errors, in the words and figures following, to wit:

Supreme court, Wisconsin Territory, July term, A. D. 1847.

SYLVESTER B. PRESTON et alia, plaintiffs in error, ads. CHARLES BRACKEN, defendant in error. } Error to Milwaukie co.

Assignment of errors.

1st. The district court erred in overruling the demurrer to the declaration.

2d. The said court erred in permitting the depositions of William Henry and John Bracken to be read in evidence.

3d. The court erred in refusing to admit, in evidence, proof of the custom, rules, and regulations of the miners and land owners in the Wisconsin lead mines, to explain the contract or lease between the plaintiff below and Andrew Rumfrey, so far as said contract or lease had relation to said rules, custom, or regulations.

4th. The court erred in excluding proof of the sale on execution (against the plaintiff) of all his interest in the land mentioned in the declaration.

5th. The court erred in refusing to instruct the jury as asked by the defendants below, and in its charge to the jury.

6th. The verdict was not in accordance with law.

7th. The motion for a new trial should have been sustained.

DUNN, JONES & CRAWFORD,
Att'ys for plaintiffs in error.

And afterwards, to wit, on the day and year last aforesaid, the said defendant in error, by J. P. Walker, esq., his attorney, filed in the clerk's office aforesaid, his joinder in error, in the words and figures following, to wit:

TERRITORY OF WISCONSIN:

SYLVESTER B. PRESTON et als., pl'ffs in error,
vs.
CHARLES BRACKEN, defendant in error.

Supreme court, July term, 1847.

And now comes the said defendant in error, by J. P. Walker, his attorney, and says and alleges that there is no error in the record and proceedings in this cause, and prays that the court may proceed to examine into the said record and proceedings, and to affirm the judgment in said cause.

J. P. WALKER, *for def't in error.*

And afterwards, to wit, at a term of said supreme court, begun and held at Madison, the seat of government of said territory, on the third Monday, to wit, on the 19th day of July aforesaid, on the ninth day of the term, to wit, on the 27th day of July aforesaid, the said cause being at issue, the following further proceedings were had in said cause, to wit:

SYLVESTER B. PRESTON, WILLIAM KENDALL, WILLIAM NICHOLS, and WILLIAM T. PHILLIPS, pl'ffs in error,
vs.
CHARLES BRACKEN, def't in error.

This day came the parties aforesaid, by their attorneys, and this cause having been fully argued on the errors assigned, and the court, not being now sufficiently advised of and concerning the same, took time to consider of its opinion.

And afterwards, to wit, on the 15th day of the term aforesaid, on the second day of August, A. D. 1847, the following judgment was rendered by said court in this cause, to wit:

SYLVESTER B. PRESTON, WILLIAM KENDALL, WILLIAM NICHOLS, and WILLIAM T. PHILLIPS, pl'ffs in error,
vs.
CHARLES BRACKEN, def't in error.

The court being now sufficiently advised of and concerning the matters and things contained in the assignment of errors and transcript of the record in this cause, (his honor Judge Irvin not taking any part in the decision of the same, on account of interest in common in the title with defendant in error,) and the court being divided in opinion, his honor the chief justice being of opinion that the judgment of the

court below should be reversed, and his honor Judge Miller being of opinion that said judgment should be affirmed, the said judgment of the district court of Milwaukie county is therefore affirmed with costs, and it is ordered that the same be certified to said court to be carried into execution.

TERRITORY OF WISCONSIN,
Supreme court, ss:

I, Lafayette Kellogg, clerk of the supreme court of said territory, do hereby certify, that the above and foregoing is a true copy of all the record and proceedings in a suit lately determined in the said supreme court, in which Sylvester B. Preston et als. were plaintiffs in error, and Charles Bracken was defendant in error, as the same remain on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the [SEAL.] seal of said court, at Madison, this 25th day of December, A. D. one thousand eight hundred and forty-seven.

LAFAYETTE KELLOGG, *Clerk*,
Sup. court, W. T.

Fee for this transcript, &c., 204 folio, at 12½ cents, -	$25 50
Certificate and seal, - - - - -	1 25
Certificate and seal to bond, - - - -	1 25
Filing 5 papers, 12½, - - - - -	62½
	$28 62½

Examined and allowed.

CHAS. DUNN,
Chief Justice, Sup. Court, W. T.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the supreme court of the Territory of Wisconsin, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, between Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, plaintiffs in error, and Charles Bracken, defendant in error, a manifest error hath happened, to the great damage of the said Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have

the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and forty-six.

WM. THO. CARROLL,
Clerk of the Supreme Court of the United States.

Allowed by CHAS. DUNN, *Chief justice of the Supreme court of the Territory of Wisconsin.*

SUPREME COURT, *ss:*

I hereby make return to the within writ, by sending a full and complete transcript of all the record and proceedings had in said cause in said court.

LA FAYETTE KELLOGG,
Cl'k sup. court, Wis. Ter.

Citation.

The United States of America, to Charles Bracken, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Wisconsin, wherein Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Charles Dunn, chief justice of the supreme court of the Territory of Wisconsin, this twenty-second day of November, in the year of our Lord one thousand eight hundred forty-seven.

CHAS. DUNN, *Chief justice S. C. W. T.*

On this twenty-fourth day of November, in the year of our Lord one thousand eight hundred and forty-seven, personally appeared Lester R. Rockwell, deputy marshal for the district of Wisconsin, before me, the subscriber, William T. Henry, clerk of the district court of the United States in and for Iowa county, Wisconsin Territory, and makes oath that he delivered a true copy of the within citation to the within named Charles Bracken, on this 24th of November, A. D. 1847.

In testimony whereof I have hereunto signed my name, and affixed the seal of our said court, at the clerk's office in Mineral Point, [SEAL.] in said county, the day and year above written.

Attest: WILLIAM S. HENRY,
Clerk D. C. U. S. Iowa county, W. Ter.

Marshal's fees.

For serving citation - - -	$2 00
" 60 miles travel, a 5 c. - -	3 00
" copy of citation, 2 folio - -	33
	$5 33

Copy of appeal bond.

Know all men by these presents, that we, Silvester B. Preston, William Kendall, William Nichols, and William T. Phillips, as principals, and Witney Smith, as surety, all being of the county of Iowa, in the Territory of Wisconsin, are held and firmly bound unto Charles Bracken in the full and just sum of five hundred dollars, to be paid to the said Charles Bracken, his certain attorney, executors, administrators, or assign; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this seventeenth day of November, in the year of our Lord one thousand eight hundred and forty-seven.

Whereas lately, at a supreme court for the Territory of Wisconsin, in a suit depending in said court, between Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, plaintiffs in error, and the said Charles Bracken, defendant in error, judgment was rendered against the said Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips; and the said Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles Bracken, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next.

Now, the condition of the above obligation is such, that if the said Sylvester B. Preston, William Kendall, William Nichols, and William T. Phillips, shall prosecute their said suit to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) SILVESTER B. PRESTON, [SEAL.]
WILLIAM KENDALL, [SEAL.]
his
WILLIAM ✕ NICHOLS, [SEAL.]
mark.
WILLIAM T. PHILLIPS, [SEAL.]
WHITNEY SMITH. [SEAL.]

Sealed and delivered in presence of—
SAM. CRAWFORD.

Approved by CHAS. DUNN,
Chief justice of supreme court, Wisconsin Territory.

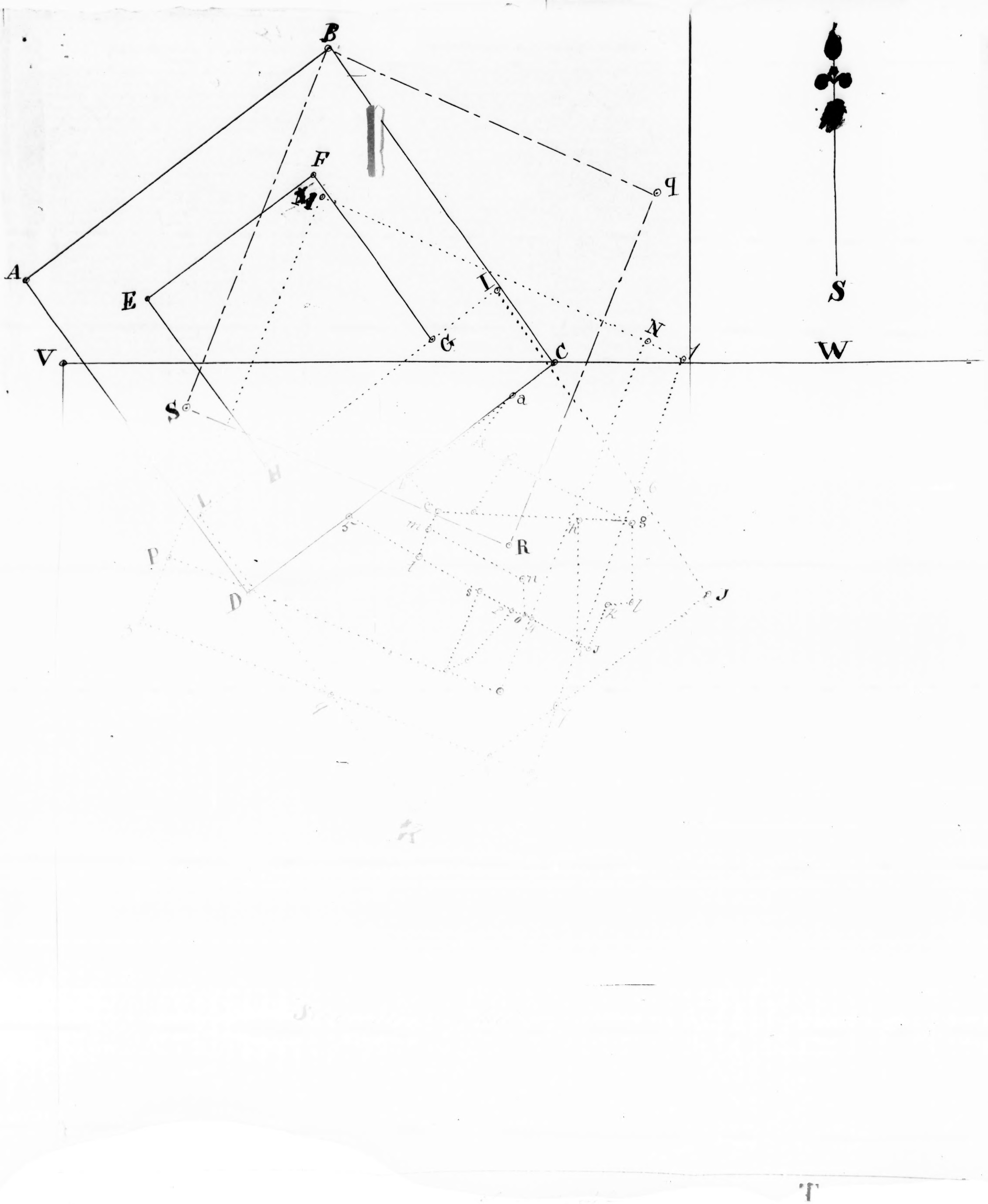
TERRITORY OF WISCONSIN, *Supreme court, ss:*

I, La Fayette Kellogg, clerk of said court, do hereby certify, that the within is a true copy of the original appeal bond in the within entitled cause on file in my office.

In testimony whereof I have hereunto set my hand, and affixed the [SEAL.] seal of said court, at Madison, the 25th day of December, A. D. 1847.

LA FAYETTE KELLOGG,
Clerk S. C. W. T.

Filed 25th February, 1848.


B
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Carter

Hamtrick

Cash

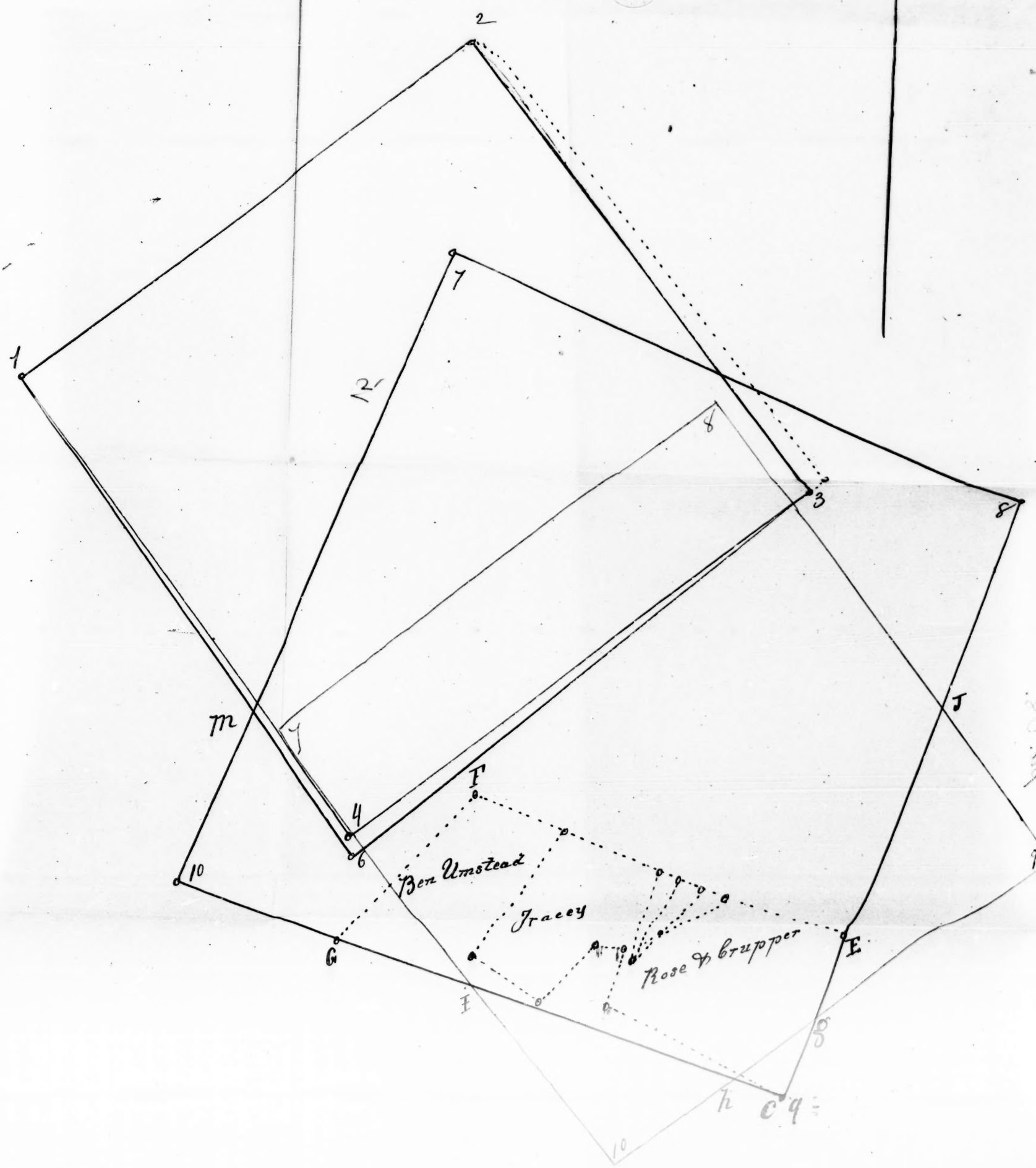
Ben Umstead

Tracey

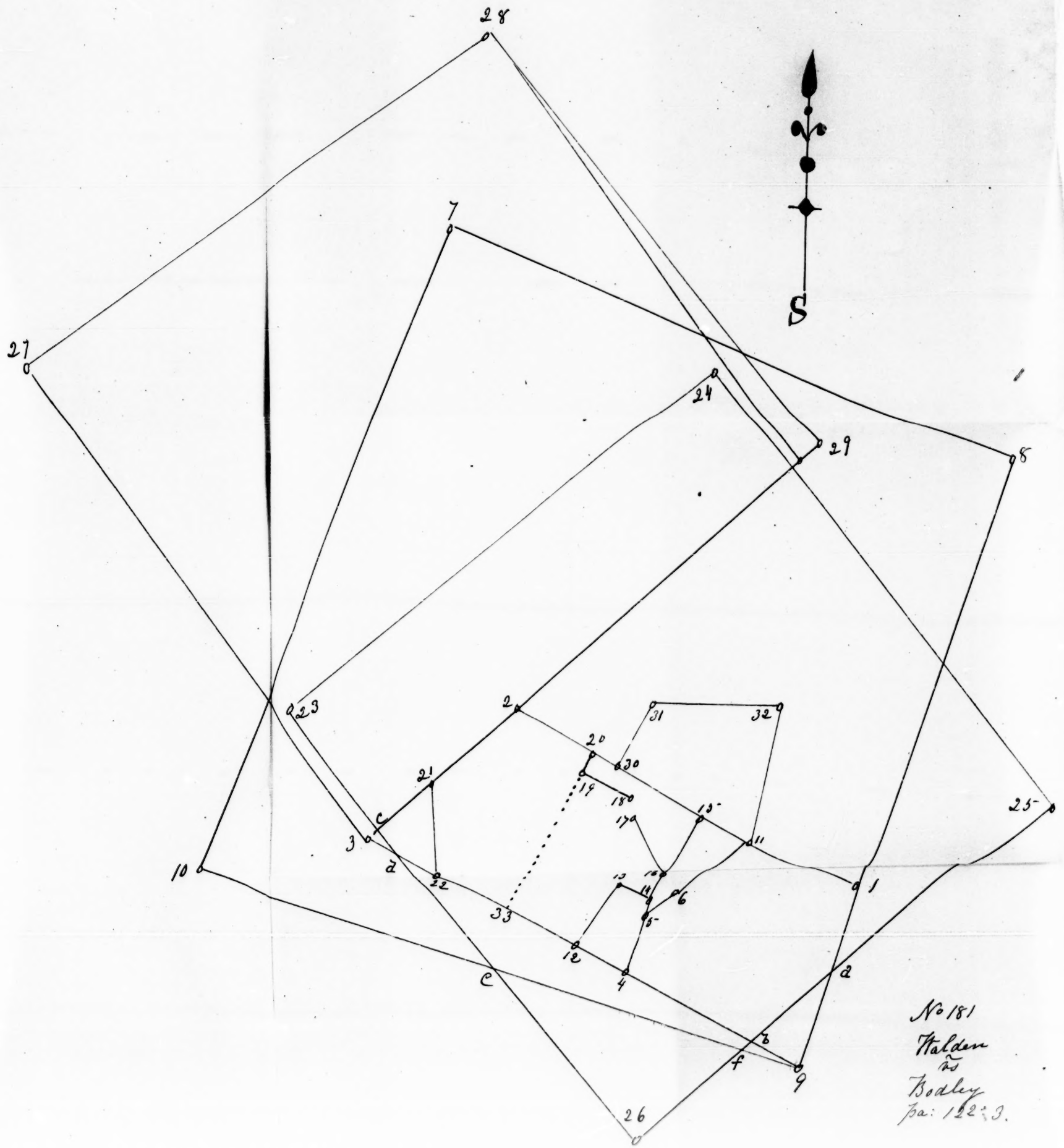
Rose & Crupper

No 181 -
Walden
vs
Bodley
pa: 120: 21 -

Scale 90 poles per Inch.



No 181
Walden
to
Bodley
Jan 1885 17



No 181
Walden
to
Bodley
pa: 122-3.

Scale 90 poles per Inch.

Johnston's fork of Licking

M

P

12

7

(4)

17

19

22

20

main

main

Mud Lick Branch

18

15

19

22

23

26

W

A. Boone's main Indian C

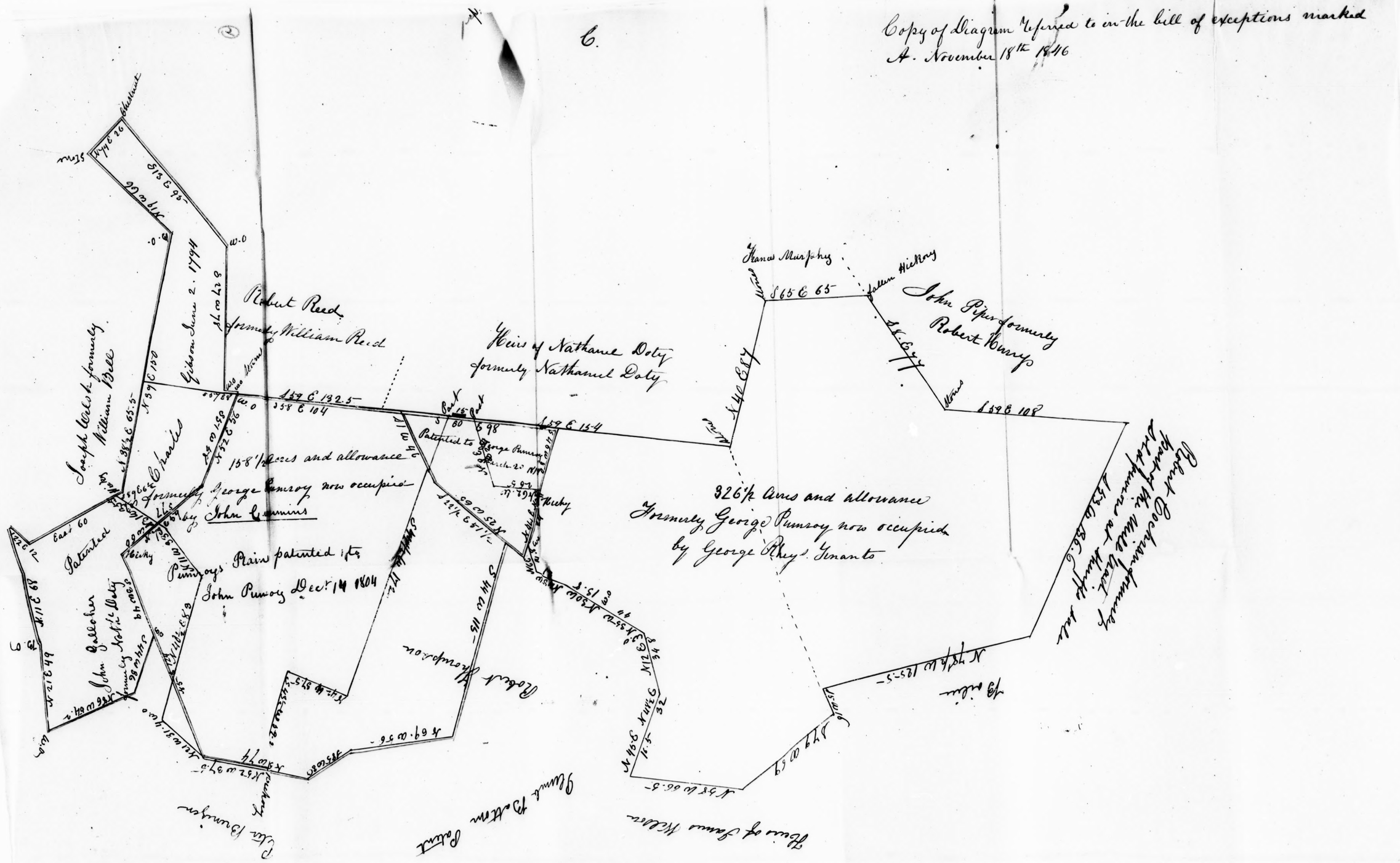
Wilson's Run

11

B. L. Lower Blue Licks

U. B. L. Upper Blue Licks

Copy of Diagram referred to in the bill of exceptions marked A. November 18th 1846



The above diagram represents a survey made by me in pursuance of an order of the Circuit Court of the United States for the Western District of Pennsylvania in the case of the Lessee of Atkinson vs John Cummins of a tract of Land situate in Derry Township Westmoreland Co. Containing one hundred and fifty eight and one half acres and allowance of 6 pr Cent &c. now in the possession of John Cummins.

The lines of the survey were traced and the adjournments noted on the 15th and 16th days of October 1846 after having given due notice to the parties

N Patterson
Surveyor

Fig. 7

Specification N°. 2.

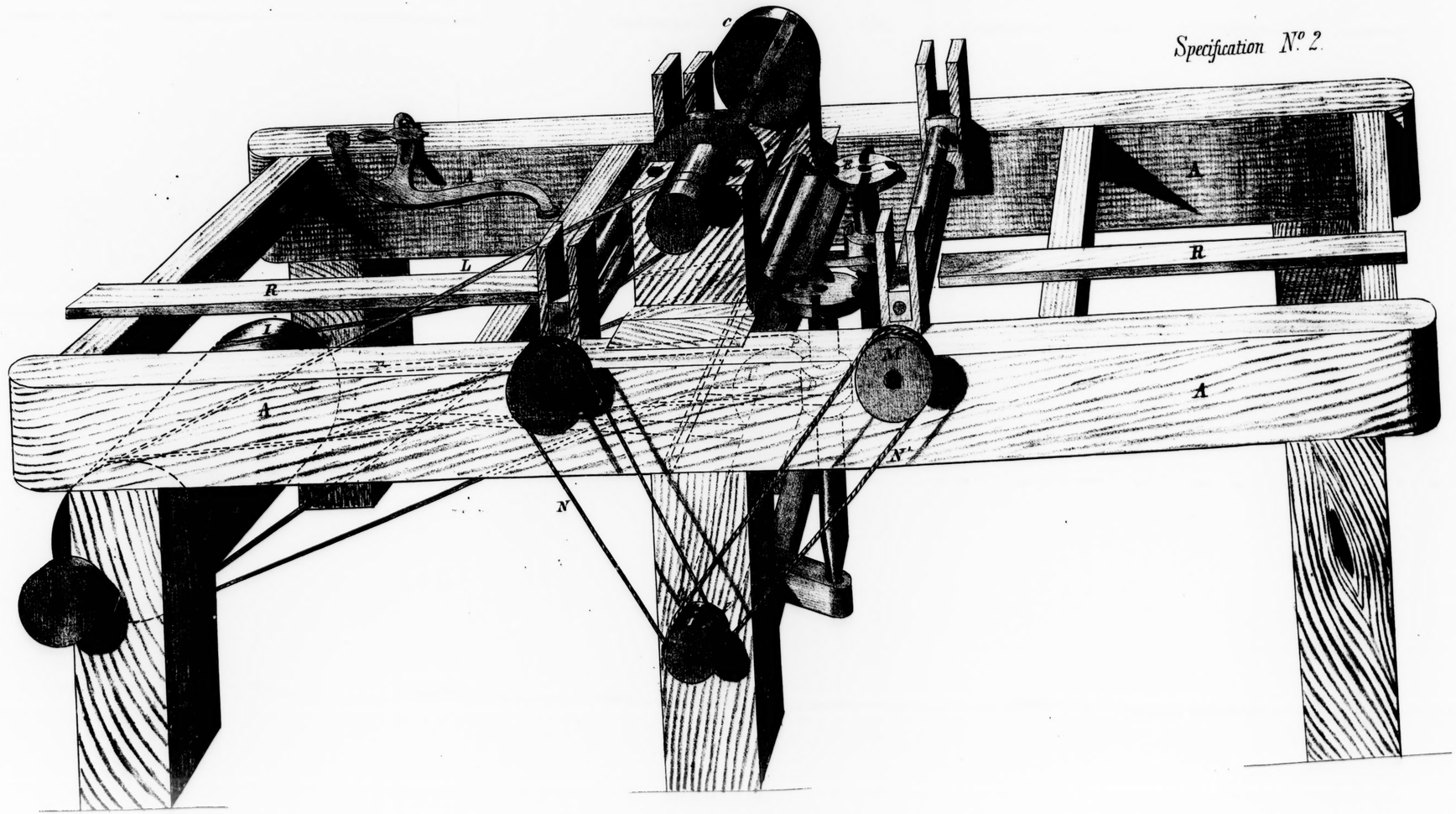
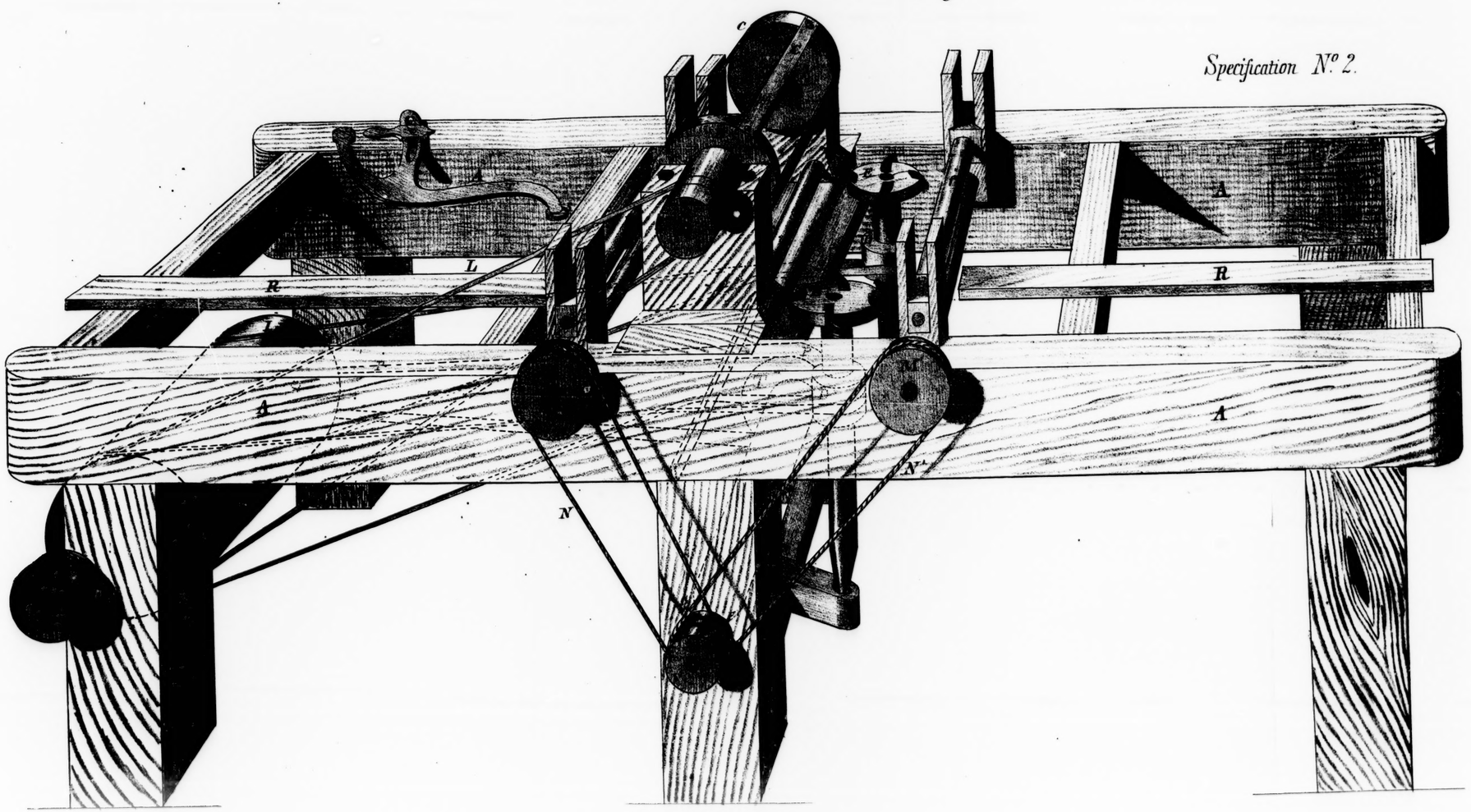


Fig. 7

Specification N.º 2.



DRAWING B.

Fig. 1.

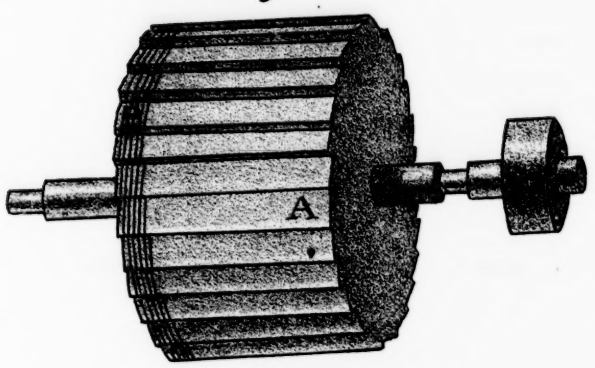


Fig. 2.

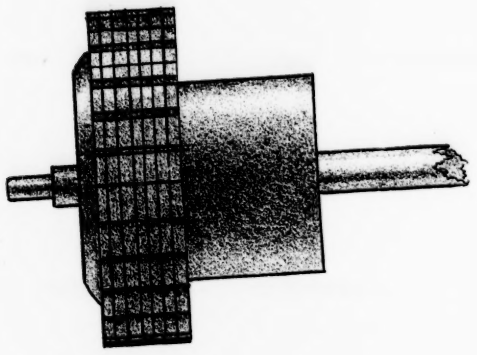


Fig. 3.

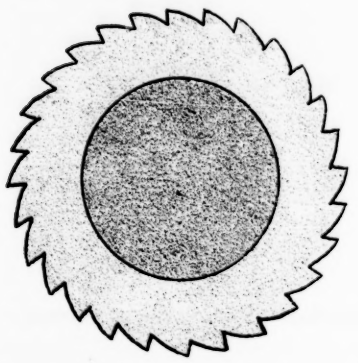


Fig. 4.

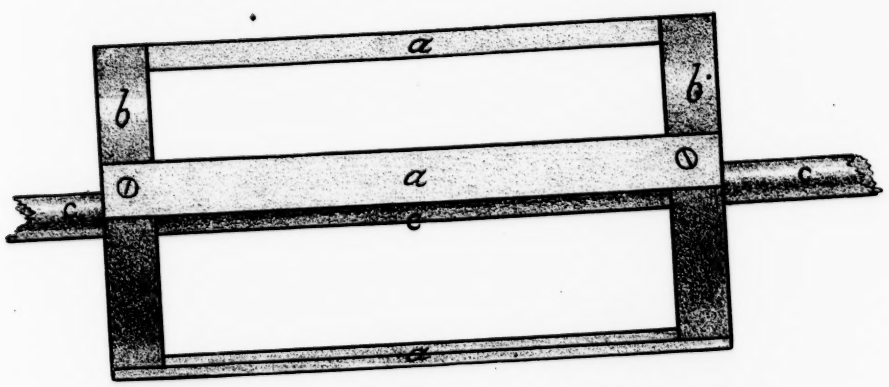


Fig. 4.

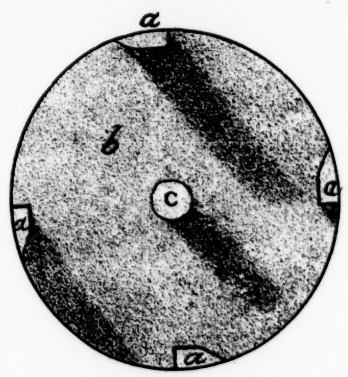


Fig. 5.

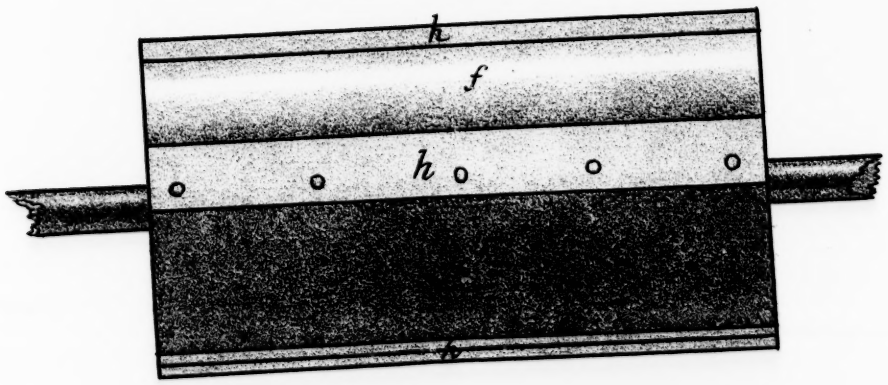


Fig. 5.

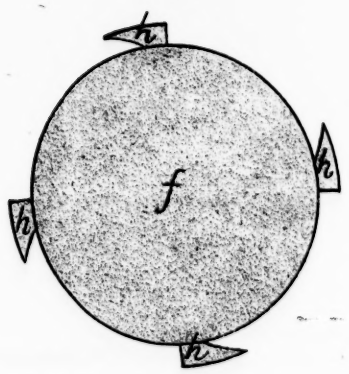


Fig. 6.

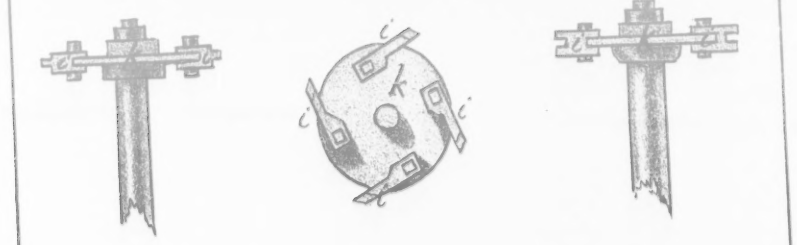
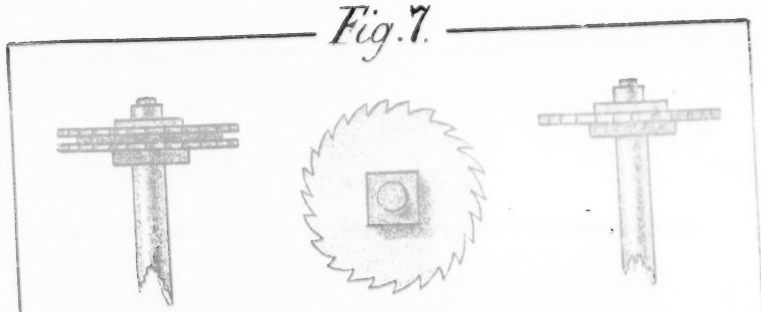


Fig. 7.



North Boundary of Orange Grove.

Bayou Marmotte

West Boundary of Orange Grove Tract

North Boundary of Plaine Claim

South Boundary of Orange Grove

H

Gte.

Gte.

Gte.

North Boundary of Price Claim
South Boundary of Claim

East North Boundary of Grange Grove

Joachim St.
St. Louis St.
Conception St.
St. Joseph St.
Dorothea St.
Hallitt St.
Hollingsworth St.
Bloodgood St.
St. Michael St.
Church St.
Conti St.
Dauphin St.
Bienville St.
Magnolia St.
Water St.
Commerce St.

A.B.C.D.E.F.G.H. Indicate the different Boundaries of the Price Claim

The different Numbers 3.5.10 &c. within a small circle represent the average depth of filling of the marshy squares

High Water Mark 1824 & 1830

Low Water Mark

Old Fence

Mobile River

Mobile

Mobile December 7th 1847

A true Copy from the original

Louis Troost
Surveyor

Lot D.

Dan: 3rd.

Street.

50 ft. 87 feet

Barton Leslie & Co.

Street.

State

Street.

Street.

River

South Boundary of

298 feet.

50 ft.

St. Anthony

Water

Commerce

Front.

Mobile

Copy.

Royal 243 ft.

50 ft. 811 feet

St. Louis 221 ft.

50 ft. 80 ft. 30 ft.

The Property Claimed by Joseph Collins is encloosed in this map by the yellow lines, and is bounded on the North by the plantation of Panton Leslie & Co:

243 ft.

This Map
Surveyed and drawn by
Charles L. Delage
Mobile, March 8th 1845 Surveyor

Map - A.

Box 341.

The Yellow lines on this Map show the boundaries of Th. Price Claim and the Red lines enclose that part claimed by Joseph Collins.-

Surveyed and drawn at the instance of Thos. A. Hamilton the Cont. by Charles L. Ddage Surveyor Mobile April 5th 1845.

Copy.

Street
Joachim
Street
Conception
Street
Joseph
St.
Royal
St. Louis
St. Anthony
Water
St.
Francis
Michael
Commerce
Front
Mobile
River
Street
Conception
Street
Joseph
St.
Royal
St.
Magnolia
St.
Water
St.
Commerce
Front
Mobile
River
Street
Street
Street